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No.

IN THE

Supreme Court Of The United States

October Term, 1986

GENEVA COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARYANN H. HIDLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court should resolve a significant and fundamental conflict among the United States Circuit Courts of Appeals regarding the jurisdiction of a District Court following a Rule 59 post judgment motion?

2. When one party files a Rule 59 (e) post judgment motion alleging error, does the District Court retain jurisdiction to alter its judgment to correct all consequential errors disclosed or only those errors helpful to the moving party?

3. In a mixed motive case, may the Court of Appeals dispense with the inquiry of whether the same employment decision would have been reached absent the discriminatory conduct?

4. May the Court of Appeals render judgment and award damages without referring to the facts of the case, thereby bypassing the strictures of Rule 52 (a) Fed. R. Civ. P. that findings of fact shall not be set aside unless clearly erroneous?

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OPINIONS BELOW

The opinions and orders of the U.S. District Court for the Middle District of Alabama are reported as follows: Opinion dated July 2, 1984 App. A-1; Order dated July 2, 1984 App. A-12; Opinion and Order dated February 8, 1985, App. A-13; Judgment dated February 8, 1985, App. A-19; Order of September 3, 1986, App. A-28; The opinions and orders of the U.S. Court of Appeals for the Eleventh Circuit are reported as follows: Opinion and Order of July 3, 1986 reported as 792 F.2d 1098, App. A-20; Judgment entered July 3, 1986 issued as a mandate August 20, 1986, App. A-25; Denial of Petition for Rehearing En Banc dated August 11, 1986, App. A-27.

JURISDICTION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit issued and entered on July 3, 1986 (reported at 792 F.2d 1098) and issued as a mandate on August 20, 1986. Petitioner timely filed and served a petition for rehearing in said Court and same was denied without opinion by order entered August 11, 1986.

By order dated October 27, 1986, the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States granted an extension of time until December 10, 1986 to petition for this Writ of Certiorari.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED IN THE CASE

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (a)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g)

New Trials; Amendment of Judgments

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has

been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 59 Fed. R. Civ. P., 28 U.S.C.

Findings by the Court

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of

the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

52(a) Fed. R. Civ. P., 28 U.S.C.

STATEMENT OF THE CASE

Preliminary Statement

Presenting a matter of first impression, this Petition asks the Court to resolve a conflict between the Fourth Circuit Court of Appeals, on the one hand, and on the other, the Eleventh Circuit Court of Appeals on the interpretation and application of Rule 59 and Rule 52 Fed. R. Civ. P.: Rules fundamental to the integrity of the District Courts and for the exercise of their proper role as fact-finders in the federal judicial system.

If one party files a Rule 59 motion to amend a judgment raising specific questions of law and fact, the Fourth Circuit has ruled that the District Court is not limited to a consideration of just those issues raised or the relief sought by the moving party. This Circuit holds that the District Court must retain the power and authority to correct any error which comes to its attention because of such motion. *United States v. Hollis,* 424 F.2d 188 (4th Cir. 1970). Otherwise Rule 59 would accomplish the incongruous result of compelling a court to knowingly perpetuate error simply because the particular error was not mentioned or beneficial to the moving party. This interpretation would fundamentally undermine the ability and duty of District Courts to preserve the integrity of their opinions. In this case, the Eleventh Circuit ruled in just this unwise fashion: the Eleventh Circuit ruled that a District Court does not retain

jurisdiction to correct errors of law and findings of fact if not specifically raised by the moving party. Petitioner herein prays that this Court will resolve the conflict between these Circuits on this important question.

The Case Below

To avert a fraud arising from the trial of the case, and to correct a miscarriage of justice from erroneous application of law, the District Court altered its initial judgment and factual findings on sexual discrimination. This action followed a Rule 59(e) Motion to Alter or Amend Judgment, which motion and its implications were briefed and argued extensively by the parties. On appeal the Eleventh Circuit Court of Appeals reversed and rendered. In doing so, the Court of Appeals set aside the factual findings of the Trial Court and held that the Trial Judge had no right, power or jurisdiction to alter or amend its judgment under the circumstances even to correct the application of law. By such summary action, the Court of Appeals imposed an erroneous and mistaken factual determination on the District Court notwithstanding this Court's holdings in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274 (1977) and *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

As a result, on remand, the District Judge faced the intolerable dilemma which other Circuits have avoided by holding that a trial judge has the discretion, power and duty to correct error as found on a Rule 59 motion. Here the Court tried to correct error and avert an injustice. But the Eleventh Circuit said no; a trial judge does not retain jurisdiction to correct his initial opinion on matters not directly raised in a Rule 59(e) motion. As a consequence, in this case the District Court faced the duty on remand to implement and perpetuate a rank injustice, an injustice which the Trial Judge had recognized and tried to avert. Faced with this unconscionable dilemma, the District Judge described the consequence following from the Eleventh Circuit's restrictive interpretation of Rule 59(e):

> In the opinion of this Court, this case was a marginal case

> for any relief at all, and Plaintiff's attorney tried the case seeking only a job as assistant principal, not back pay, damages or anything of the sort. Both the pretrial statement and the oral evidence offered at trial demonstrate this. . . .
>
> * * *
>
> This Court cannot escape the conclusion that Plaintiff's attorney brilliantly (but deceitfully) planned that program in order to encourage Defendant's attorneys to think Plaintiff sought no back pay and, therefore, to offer no evidence of mitigation. Certainly this Court and possibly the Defendant were led to so believe.
>
> Nonetheless, the Plaintiff has succeeded in convincing the Court of Appeals that Plaintiff is entitled to her full back salary for over four years with no deduction — even for pay from Geneva County she would have received as a teacher had she not breached her contract and resigned during the annual term of her contract. *Because this writer is personally unable to accept the rationale of the Court of Appeals as to the back pay issue and because this writer thinks the Plaintiff and/or her attorney have perpetuated a fraud on the Court of Appeals and on the Defendant, this writer is not unbiased in the case and, therefore, should, and hereby does, recuse himself from further consideration of the case.* (Emphasis added).
> App. A-29, 30.

To avoid this dilemma and to empower the District Court to achieve *just* rather than *unjust* results, the Appellate Courts have interpreted Rule 59 to give District Courts appropriate and necessary discretion to correct error. With the action of the Eleventh Circuit in this case, a conflict among the circuits exists regarding Rule 59, and a terrible injustice has resulted.

Statement of the Issues

In seeking relief by Writ of Certiorari, the Geneva County Board of Education raises an issue of apparent first impression for this Court to determine: whether a District Court may correct a legal error embraced in its rendered opinion if manifested by but not raised in a Rule 59(e) Motion to Alter.

In the second place, petitioner Board of Education inquires

whether the Court of Appeals may set aside findings of fact made by the District Court and reinstate an erroneous judgment without either reviewing the facts underlying the judgment, or remanding the case for application of the correct legal principle.

Finally, petitioner seeks a Writ of Certiorari to determine whether, in a Title VII case alleging disparate treatment, the Court of Appeals may dispense with the inquiry of whether the same employment decision would have been reached absent the discriminatory conduct if the employer was motivated by both discriminatory and nondiscriminatory reasons. *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274 (1977).

Factual Background

This case originated as an action under Title VII of the *Civil Rights Act of 1964,* 42 U.S.C. § 2000(e), *et seq.*, and jurisdiction was grounded on 28 U.S.C. § 1331. Respondent, Maryann H. Hidle (hereinafter referred to as "Hidle" or "Respondent"), a white female,[1] alleged that she had been denied an equal employment opportunity, specifically *a part-time* position as assistant principal, with Petitioner, the Geneva County Board of Education[2] (hereinafter referred to as "Board" or "Petitioner") on account of her sex.

Respondent Hidle worked for the Geneva County Board for over four years as a teacher. She had acquired tenure. However, just months before the vacancy occurred for the position Respondent seeks herein, she abruptly resigned her job as a teacher in mid contract in the middle of the school year and left the State of Alabama. Respondent explained this sudden and disrupting departure from the school system as being nec-

[1]Race is not an issue in this case since both Respondent and the male employee ultimately hired were both of the same race.

[2]The Geneva County School system is a small, rural system in southeastern Alabama serving an agricultural county adjoining the State of Florida. It is one of the poorest, least populated counties in Alabama; the largest city, Geneva, has 4,866 people, and the population of the entire county is 24,253.

essary to maintain her family and preserve her marriage by accompanying her husband to a new job in Florida. (App. A-31). Several months after leaving her job and the state, Respondent reapplied for employment, but her abrupt departure, the resignation of her teaching position and tenure status, and her change of residence out of state provided in part the backdrop for the decision ultimately made by the Board.

Three months after resigning her teaching position and leaving the State of Alabama, Respondent sent in another job application on April 12, 1982 in which she stated in general terms: "I prefer fourth grade language arts. I am prepared to teach or supervise or to administrate." (App. A-32). This application of employment was on file with the Board when a vacancy for the part-time job of assistant principal at the Geneva County Middle School (also referred to as Hartford Middle School) became vacant four months later in August, 1982. Compensation for the part-time job as assistant principal was $500 per year.

The assistant principal's position became vacant following a sequence of events. The incumbent assistant principal, Hiram Phillips, suffered from a series of mental problems that caused him to take a leave of absence in January of 1982 and ultimately led to his resignation of August, 1982. During this entire period while Hiram Phillips was absent, Franklin Lee (hereinafter "Lee"), a white male, served as a substitute for the ailing assistant principal. The Board selected Lee to substitute for Phillips at random from a list of qualified substitute teachers. Lee worked as a substitute teacher and performed part-time duties as assistant principal from January until he was hired on a permanent basis in August of 1982. Lee performed in an outstanding manner during this time and restored the order and discipline to the school that had been lost during the protracted mental and health problems suffered by the previous assistant principal.

On August 8, 1982 the ailing assistant principal, who had taken a leave of absence, resigned his job. This resignation came at an extremely inconvenient time for the Board. School

was about to open and the Board, which under state law had to approve all personnel decisions in the system, was scheduled to meet the next day on August 9, 1982. On short order, therefore, the Board had to fill this vacancy for this part-time position of assistant principal. It had two applicants to choose from: (1) Respondent Hidle, a female, who had just resigned her job in mid term, lived out of state, and had never worked as an assistant principal, but had good academic credentials; and (2) Lee, a male, who performed in an excellent manner on the actual job to be filled, and lived in Hartford where the school was located. The District Court analyzed this predicament in its first opinion:

> Principal Whittaker who was principal of the three schools in Hartford . . . testified that, faced with the problem of the impending opening of school during August, 1982 the Principal, Superintendent and County School Board were required to fill the position within a short time. There was little time to advertise the job and they had two satisfactory applicants — Mr. Lee and Plaintiff Hidle — who had generally applied for assistant principalships to the Board theretofore. It was not denied that either of the candidates was highly acceptable — and [the] Board, who ultimately employed Lee, faced the dilemma of selecting one of the two satisfactory candidates.

(App. A-4)

The Board hired Lee for the position upon the recommendation of the principal and superintendent who both felt Lee had demonstrated the strength of personality and abilities to correct the problems and assert the leadership needed to restore discipline that had faltered with students and teachers during the incumbent's illness. Lee had done outstanding work the previous months on the job, was immediately available, and was completely familiar with the job responsibilities. Lee did not already have in hand the academic certifications of Respondent, but he was qualified by state standards for the position of assistant principal since he was enrolled in a program to obtain certification as an administrator. He was fully qualified and certificated to accept the primary job as a teacher

to which the part-time job as assistant principal was supplementary. By contrast, Respondent had recently resigned the teaching position, had never worked as assistant principal, lived in Florida and was not deemed to have the leadership abilities demonstrated by Lee. Weighing these considerations the Board hired Lee. Thereafter Hidle filed suit claiming discrimination.

After a non-jury trial, the District Court issued an opinion based on the analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). The District Court failed, however, to apply or consider the sequential analysis required by the Supreme Court in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274 (1977). In *Mt. Healthy,* this Court held that once plaintiff proves discrimination by the preponderance of the evidence, *the Court must consider whether the employer would have reached the same decision even absent the presence of the discriminatory factor.*

In its initial opinion the District Court applied *McDonnell Douglas* to find that plaintiff was entitled to prevail on the basis of her certification although her case was "not at all overwhelming" and that it was a "close case."

The District Court did not consider or determine whether the Board would have hired Lee or Hidle even absent the presence of sexual preference in light of Hidle's resignation, departure from the state, and lack of job training. Since damages were not requested in the pretrial order and no evidence of financial loss had been adduced at trial, the Court ordered only that the Board offer Hidle the next vacant assistant principalship.[3]

[3]The Board did *not* file a post-trial motion from this order. The Court had not ordered any other relief or damages. The Board strenuously denied the allegations of discrimination, but had no objection to offering Hidle the next assistant (part-time) principalship. If the Court had found specific discrimination, ordered reinstatement at the expense of Lee, and ordered back pay, the Board would have faced a different set of circumstances. But since the District Court never ordered such relief, the Board did not have to consider such matters in deciding whether to appeal. Yet now the Board faces all of these very matters — immediate reinstatement,

Within ten days of the Court's order of July 2, 1984, Hidle filed a Rule 59 Motion to Alter and Ament the Court's judgment. In the motion, Plaintiff sought installment to the assistant principal's position, back pay and interest. Set down for oral argument, the motion and its ramifications were extensively argued by both parties. After considering the motion and arguments, the Court, thereafter, issued a second opinion in which it reviewed "all of the evidence to determine what evidence there was in regard to damages and to what extent the matter was either litigated or ignored during the trial of this case." (District Judge's Opinion, App. A-13, 14.) On reconsideration, the District Court found that it had not properly applied the *Mt. Healthy* test as construed by the Eleventh Circuit, and consequently had failed to determine whether Lee would have been given the job even if Lee and Hidle had been of the same sex.

The Court then reexamined the evidence in the light of the *Mt. Healthy* test, and found that Hidle had resigned her contract at mid-term and had given up a tenured position in Alabama some eight months before the selection of the assistant principal, on the grounds that it was necessary for her family life to relocate to Florida with her husband and family. The Court expressed its assumption based on the trial evidence and pretrial agreement that Hidle had obtained a higher paying job in Florida and was not financially damaged when the Board had not rehired her. Moreover, she was living in Florida, which was a two hour trip from the school. Since the assistant principal's position only paid $500.00 more per annum than a teacher's salary with the Board, the Court found that it "was reasonable to conclude that Plaintiff was coming back to Geneva County as a temporary matter for the purpose of establishing

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and back pay – because the Eleventh Circuit not only reversed but rendered the case. As a consequence of the Appellate Courts' summary treatment, the Board never had an opportunity to redress these matters from an order of the District Court. By rendering the case, and imposing its factual determination, the Court of Appeals assumed the role of the trial court and deprived the Board of its right to appeal from erroneous findings of fact and conclusions of law.

a base as an Assistant Principal from which she could better apply for a better job to other places where her husband might be assigned."

The Court found from the evidence that the principal at the involved school who made the recommendation to hire Lee had previously supervised both Hidle and Lee. Lee had successfully demonstrated his leadership abilities at the school the preceding semester but, by contrast, the principal had reservations about Hidle's ability as a leader. The Court took into account that the previous assistant principal had been unreliable during his illness and had demonstrated bizarre behavior. Against this backdrop Lee had performed outstandingly in the assistant principal's position. He was an excellent teacher, punctual, dependable and already on the job. He was also a strong disciplinarian. From his experience teaching in the military he had more general teaching experience than Hidle, although she was considered an effective teacher. Although Lee did not have the equivalent academic certification held by Hidle, he was qualified for the job under the Alabama state standards. The Court found that taking all the evidence into account, the Board would have hired Lee even if both applicants had been of the same sex: one was proven on the job; the other applicant had resigned and moved out of the state.

On appeal, the Eleventh Circuit addressed the issue of whether a Rule 59(e) motion empowers the District Court to vacate a judgment in favor of the moving party so as to rule in favor of the non-moving party. The Court of Appeals concluded that the District Court had abused its discretion by correcting its opinion on the basis of the *Mt. Healthy* analysis, since the correction caused Hidle, the movant, to be adversely affected. Instead of remanding the case to the District Court to correct the legal error, and afford the Board an opportunity to show, pursuant to *Mt. Healthy* that the same employment decision would have been reached absent discrimination, the Court of Appeals entirely dismissed the *Mt. Healthy* issue with this cryptic statement:

> The *Mt. Healthy* issue, on the basis of which the trial court reversed itself, was neither pleaded by the defendant nor referred to in the pretrial order.
> 792 F.2d at 1100.

In this regard the Court of Appeals was mistaken. The Board had stated in the pretrial order:

> 4.B. Plaintiff was not rejected for hiring as an assistant principal because of her sex but was rejected because the person hired was better qualified for the position.

Nevertheless, the Court of Appeals then reversed the District Court with instructions to reinstate its first erroneous opinion "as originally granted." Illogically, however, the Court of Appeals did not reinstate the remedies which flowed from that opinion which only granted injunctive relief since no damages had been proven at trial. Without assigning any legal or factual basis for its action, and having expressly declined to review the merits, the appellate court substituted its own opinion on the facts for that of the trial judge. The Court ordered the Board to restore Hidle to the position she would have occupied in the absence of a violation of Title VII, back pay with interest and an injunction against further violation of Title VII by the Board.

On remand to the District Court, the judge who had heard the case wrestled with the inherent inconsistency between his first erroneous opinion and the Eleventh Circuit's unsupported conclusions. He found it impossible to reconcile the Eleventh Circuit's award of back pay for the entire time period since Hidle had resigned from the school system. The District Judge noted that Hidle had voluntarily breached her contract prior to any alleged wrongdoing by the Board, months before Lee was given the job. The District Court also found that the case had not been tried as a damage or back pay suit, and as a result, no evidence had been introduced concerning back pay or interim earnings to mitigate damages. The Judge concluded:

> Nonetheless, the Plaintiff has succeeded in convincing the Court of Appeals that Plaintiff is entitled to her full back

> salary for over four years with no deduction – even for pay from Geneva County she would have received as a teacher had she not breached her contract and resigned during the annual term of her contract. Because this writer is personally unable to accept the rationale of the Court of Appeals as to the back pay issue and because this writer thinks the Plaintiff and/or her attorney have perpetrated a fraud on the Court of Appeals and on the Defendant, this writer is not unbiased in the case and, therefore should and hereby does, recuse himself from further consideration of the case. (App. A-30)

It is respectfully submitted, that as the District Court Judge has discerned, the Court of Appeals' opinion is entirely inconsistent and requires review on the basis that the decision conflicts with controlling legal principles.

ARGUMENT

When One Party Files A Rule 59(e) Post Judgment Motion Alleging Error, Does The District Court Retain Jurisdiction To Alter Its Judgment To Correct All Consequential Errors Disclosed Or Only Those Errors Helpful To The Moving Party?

The pivotal and significant issue presented for resolution by the Supreme Court with this Petition involves a conflict of opinions between the Eleventh Circuit Court of Appeals, on the one hand, and, on the other, the opinion of the Fourth Circuit concerning Rule 59 Fed. R. Civ. P. and the power of the District Court to correct errors in a judgment which are disclosed following a Rule 59(e) post judgment motion.

The Fourth Circuit Court of Appeals has held that a District Court retains jurisdiction to modify findings of fact or conclusions of law to the full extent necessary to achieve a just and fair resolution of the issues. The Fourth Circuit rejected specifically the argument that the District Court is restricted to just those modifications suggested by the moving parties, observing wisely that a District Court must have the flexibility

to correct not just that error pointed out by the moving party, but all error made manifest to the Court by whatever source.

Any other holding would be short-sighted and ill-considered. For example, if a District Court finds "A" because of "B" because of "C" because of "D" because of "E", does it make sense to correct an error in "B" but leave "D" and "E" dangling and without foundation merely because the moving party on a Rule 59(e) motion only pointed out the error in "B"?

The Eleventh Circuit holds in this case that the District Court can only correct "B" no matter how inconsistent or even absurd the opinion might be. The Eleventh Circuit reasons that otherwise a party might be inhibited from raising any error in order to avoid being at risk. The fallacy of this reaoning is crystal clear. Parties accept that risk every day. Moreover, assume *arguendo* that a District Court were constrained to correct only some errors in an opinion as raised in a Rule 59(e) motion, this would not accomplish any constructive results. The non-moving party would simply appeal the decision to the Court of Appeals to correct findings "C" and "D" and "E" which were dependent on finding "B". The only consequence of the holding of the Eleventh Circuit would be to set up a District Court for scorn and ridicule because it would be, on Rule 59 motions, handicapped from doing full justice.

In more considered fashion, the Fourth Circuit has held that on motion by a party the District Court retains jurisdiction to modify findings of fact or conclusions of law which are erroneous, and that the judge is not restricted to just those modifications suggested by the parties. *United States v. Hollis,* 424 F.2d 188 (4th Cir. 1970). See also *United States v. Jacobs,* 298 F.2d 469 (4th Cir. 1961).[4]

In the same manner, the Seventh Circuit affirmed the holding of a District Court that it unquestionably retains the right

[4]In this case, the parties filed motions seeking modification of the judgment pursuant to Rule 60(b). Applying the same rationale, the Fourth Circuit held that the District Court had the power to reopen the judgment and modify it to grant relief sought by the intervenors, although such relief was not requested by the parties.

to correct error when discovered. In *Continental Casualty Co. v. American Fidelity & Cas. Co.*, 186 F.Supp. 173 (1959), aff'd 275 F.2d 381 (7th Cir. 1960), the Court vacated its judgment and entered a new judgment on grounds that were not raised in the motion to amend the judgment. The Court said at 186 F.Supp. 178:

> The only question remaining, and a question which arises by reason of the above conclusion, is whether or not the court has power, under Fed. R. Civ. P. 59(e), 28 U.S.C., to enter judgment in accordance with its conclusions herein expressed. To my knowledge there has not to date been a judicial determination whether a motion by a party to alter or amend a judgment *merely presents to the court the issues therein expressly raised or whether the effect of such a motion is to open up the judgment for correction also of any other error which may have intervened in the entry of the judgment.*
>
> *I think the latter is the effect of such a motion; that it opens up the judgment and permits the court to correct any error which comes to its attention because of such motion. If this is not so the Rule would accomplish the incongruous result of compelling a court to knowingly perpetuate error simply because the particular error was not mentioned by the moving party, or, in the alternative, to reinstate the cause for further needless proceedings.*
>
> The language of Subsection (e) of Rule 59 is not particularly helpful. Thus, that subsection provides only that 'A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.' The history of that provision suggests, however, that the paragraph of Rule 59 was intended as an express recognition of the inherent power of a trial court to correct errors of law and of fact which have intervened in the entry of any judgment, and as an adoption of the rule established in *Boaz v. Mutual Life Ins. Co. of New York*, 8 Cir., 146 F.2d 321. (Emphasis added).

After analyzing the *Boaz* case, the Court continued at 179:

> The *Boaz* case prompted the Advisory Committee on Amendments to Rules, in its recommendations made in 1946, to propose the adoption of the present paragraph

(e) as an addition to Rule 59. That proposal was submitted by the committee with the following recommendatory note:

> Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Ins. Co. of New York*, C.C.A. 8, 1944, 146 F.2d 321, and *makes it clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry* . . . 28 U.S.C.A., pp. 270-271. That recommendation was followed and the present provision for motion to alter or amend a judgment was added as a new paragraph, (e) to Rule 59, which governs procedure on motions for new trial. (Emphasis added).

Moreover, the Court extended its discussion of the rule and found that paragraph (e) of Rule 59 must be interpreted in the light of paragraphs (a) and (d) of Rule 59 which provide, inter alia:

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law *or make new findings and conclusions*, and direct the entry of a new judgment. (Emphasis added).

Rule 59(a) Fed. R. Civ. P.

> Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for *a reason not stated in the motion.* In either case, the court shall specify in the order the grounds therefor. (Emphasis added).

Rule 59(d) Fed. R. Civ. P.

The Court then reconciled the provisions of paragraph (e) with the Court's powers to grant new trials and to consider its opinions *sua sponte*:

> Paragraph (e) of the Rule which merely fixes the time within which motion to alter or amend shall be filed, must

> be construed as contemplating a procedure coextensive in its scope and its grant of power to the trial court with that upon motions for a new trial. *Any other construction would render paragraph (e) meaningless.* I think the position untenable to suggest that the court might on its own initiative within ten days after entry of judgment decide that the judgment is erroneous, set the same aside and grant a new trial, but that the court has not the power, upon a motion under Rule 59(e) to alter a judgment to take like notice of errors which fatally affect its judgment. (Emphasis added).
> Id. at 179.

See also 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2817 n.34 (1973).

More recently in *United States v. Hollis,* 424 F.2d 188, 191 (4th Cir. 1970), the Court explained that the District Courts' jurisdiction includes the right to vacate a judgment:

> Manifestly, the District Judge, sitting without a jury, had the authority to amend his original order pursuant to plaintiff's motion. Rule 59, Fed. R. Civ. P. Appellee's argument is that since the plaintiff's motion to amend was related to the quantum of the damage award, the judge was limited to a consideration of that point and was without authority to amend the order in respect to Hollis' negligence. *The argument is without force, for a district judge is not restricted to the modifications suggested by the parties.* Rule 59(a) takes a broader view. . . . The rule accords with reason. *A district judge should not be forced to perpetuate a finding of fact or conclusion of law which he discovers to be erroneous.* (Citations omitted, emphasis added).

See also *United States v. Jacobs,* 298 F.2d 469 (4th Cir. 1961).

In a leading treatise on federal practice, the reasoning for this expanded rule is stated in slightly different terms; see 6A MOORE'S FEDERAL PRACTICE § 59.12[1], at 59-289 (2d. Ed. 1986):

> Although the motion under (e) is to 'alter or amend' the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or

> *vacate*. It would be an unreasonably narrow position to hold that a judgment may be modified and amended only up to the thin line where it amounts to a vacation of the judgment altogether.

The Eleventh Circuit explained the decision in terms of its feared consequence that if a party stands to lose its judgment when that party seeks correction of a legal error, the error-correcting function of a Rule 59(e) motion will be impaired. However, the Ninth Circuit holds the opposite view, reasoning that when a judge exercises his power to alter erroneous judgments a needless appeal is avoided. Citing *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979), the Ninth Circuit stated:

> 'Errors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures without thorough briefing by the parties. A motion for reconsideration may, in some instances, avoid the necessity of an appeal.' Clipper's motion enabled the trial judge to reconsider the validity of his judgment, *and to vacate or alter it as he saw fit*. (Emphasis added).

Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240, 1249-1250 (9th Cir. 1982) cert. denied 459 U.S. 1227 (1983).

In A Mixed Motive Case, May The Court Of Appeals Dispense With The Inquiry Of Whether The Same Employment Decision Would Have Been Reached Absent The Discriminatory Conduct?

The basic flaw in the Eleventh Circuit's opinion is that the Court of Appeals has made a determination of liability and has awarded remedies to Hidle without inquiring whether the Board would have made the same employment decision absent the discriminatory conduct. Even without such findings as findings of fact based on the evidence, the Eleventh Circuit ordered that Hidle be installed as the Assistant Principal and awarded back pay and interest even though the Court has not

determined whether the Board had other legitimate reasons for hiring Lee instead of Hidle: Lee demonstrated success on the job, and assured availability contrasted with Hidle's abrupt resignation and departure from the State of Alabama.

In *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 287 (1977), a case in which a school board refused to rehire a school teacher in a mixed motives case, this Court established the procedure for District Courts to follow in such cases. This Court said that once it had been determined that prohibited conduct was a "substantial" or "motivating" factor, "the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the prohibited conduct." Writing for the Court, Mr. Justice Rhenquist explained the reason for the inquiry as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision — even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him *because of constitutionally protected conduct.* But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision. (Emphasis added).
> Id. at 285-286.

Hidle abandoned the school system in mid-term, and moved out of state. This abrupt departure constituted, to be sure, an "abrasive incident" of sorts that unquestionably affected the outcome of the question whether to hire Hidle or Lee. But this was not a discriminatory reason; nor was the fact that Lee had performed so well on the actual job.

However, in the case at bar, the Eleventh Circuit chose to totally disregard the *Mt. Healthy* test with this erroneous statement: "The *Mt. Healthy* issue, on the basis of which the trial court reversed itself, was neither pleaded by the defendant nor referred to in the pretrial order."[5] In fact, the Board *had* reserved the *Mt. Healthy* defense. In the pretrial order the Board stated: "4.B. Plaintiff was not rejected for hiring as an assistant principal because of her sex but was rejected because the person hired was better qualified for the position", thus indicating that the Board had other, non-discriminatory reasons for hiring Lee.

Incredibly, the Eleventh Circuit instructed the District Court to reinstate its original opinion thereby compounding the legal error of this case. By ordering the Court to reinstate its original opinion the Eleventh Circuit forces the District Court to sanctify a decision legally and fundamentally flawed; and the Eleventh Circuit compounds that error by ignoring this Court's holding and directive in *Mt. Healthy*. Instead, the Court of Appeals ordered wholesale for the District Court to grant Hidle all relief requested in her post-trial motion, regardless of whether the relief sought in Hidle's self-serving request fits the trial facts, the law, or otherwise. The Eleventh Circuit simply ordered all relief requested by Hidle in its self-serving pleading without consideration of the trial evidence or the factual findings of the District Court: ". . . restore her to the position she would have occupied in the absence of the viola-

---

[5]The Eleventh Circuit recognizes but failed to apply that the District Court's finding that the employer would have reached the same decision absent the illegal motive is a complete defense. *McCarthney v. Griffin-Spalding County Bd. of Educ.*, 791 F.2d 1549, 1553 (11th Cir. 1986).

tion of Title VII, pay her back pay with interest and enjoin further violation of Title VII by the defendant". As a result of dispensing with the *Mt. Healthy* inquiry, Hidle was placed in a *better position* than she would have occupied absent any discriminatory conduct.

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975) this Court observed that one of the purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination. However, in order to restore an employee to the financial and employment position which the employee would have occupied but for the discrimination, the Court must address the question whether the employee would have been hired absent the discrimination. It is clear that Congress intended that persons who were not hired for other non-discriminatory reasons should not recover; this is evident from the statute pertaining to remedies:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national orgin or in violation of Section 2000e-3(a) of this title.* (Emphasis added).

42 U.S.C. § 2000e-5 (g).

Consistent with the statute, the Eleventh Circuit has held that once discrimination has been proven, a presumption of entitlement to remedies arises, and the burden then shifts to the employer to rebut the presumption by showing the discriminatee would not have been hired absent the discrimination. *Lewis v. Smith,* 731 F.2d 1535, 1538 (11th Cir. 1984). In the case at bar the District Judge omitted to apply the *Mt. Healthy* test in rendering his first erroneous opinion. Since this case was *not* tried as a back pay case and the claim for back pay only arose at the post-trial motion, the Board never had occa-

sion to litigate the statutory defense to back pay and interest.[6]

Thus, both the case law and the statute give the right to the employer to show that the employee was rejected for a reason other than impermissible opinions. By reinstating an opinion which was decided without reference to the *Mt. Healthy* test, and by awarding remedies without giving the Board an opportunity to rebut the inference of remedies, the Eleventh Circuit has denied the Board its right to justify and explain its actions. The Eleventh Circuit's decision on this important question of federal law conflicts with decisions of this Court and the *Civil Rights Act.*

May The Court Of Appeals Render Judgment And Award Damages Without Referring To The Facts Of The Case, Thereby By-Passing The Strictures Of Rule 52(a) Fed. R. Civ. P. That Findings Of Fact Shall Not Be Set Aside Unless Clearly Erroneous?

The propensity of the Eleventh Circuit to usurp fact-finding responsibilities and arrogate that function to itself in the guise of appellate review is well documented. *Pullman-Standard v. Swint,* 456 U.S. 273, 291-293 (1982). This case demonstrates a variation on that practice prohibited by the Supreme Court: fact-finding by the Eleventh Circuit and judgment rendered.

In this case the Eleventh Circuit substituted its factual determination on the issues of both liability and damages granting Hidle the relief requested in her Rule 59(e) motion regardless of merit. By ruling in such an arrogant way, the Eleventh Circuit not only furthered the *fraud* denounced by the District Judge in his opinion on remand (App. A-28) but circumvented the standard of appellate review codified in Rule 52(a) Fed. R. Civ. P. which requires that a Court of Appeals

[6]In *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 403-04 n. 9, (1977) the Court said:

> Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.

should not set aside findings of fact of the trial court unless they are clearly erroneous.

The appellate court's proper function in this case should have been to remand the case to apply the rule enunciated in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 287 (1977). In accordance with that opinion, the employer must be given the opportunity to prove that the same employment decision would have been reached even in the absence of the prohibited conduct. *Mt. Healthy* further states that if the District Court's opinion does not reveal what decision the Court would have reached if the proper test had been applied, the District Court's opinion must be vacated and the case remanded to afford the prospective employer the opportunity to prove that it would have reached the same decision regardless of a discriminatory motive, and irrespective of whether discrimination was a substantial factor in the employer's employment decision.

In the *Mt. Healthy* decision, this Court ordered a remand to apply the *Mt. Healthy* test in these words:

> We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.
> Id. at 287.

In *Pullman-Standard v. Swint,* 456 U.S. 273, 291-293 (1982), this Court condemned the Fifth Circuit (the predecessor to the Eleventh Circuit) for arrogating to itself the fact-finding responsibilities of the District Court. The Court stressed the necessity for a remand in these words:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings . . . .

> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332, 42 L.Ed.2d 498, 95 S. Ct. 472 (1974). All of this is elementary.
>
> * * *
>
> Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. . . . It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

This Court has recently affirmed that findings of fact made by the District Courts in employment discrimination cases are subject to the clearly erroneous standard of review in the courts of appeal. *Anderson v. Bessemer City*, 470 U.S. ....., 105 S.Ct. 1504, 84 L.Ed.2d 518, 524 (1985). In further review of this clearly erroneous standard, the Supreme Court explained at 84 L.Ed.2d 528:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of facts simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.' *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969).

In this case, the District Court assessed the credibility of the Board's articulated reasons for selecting Mr. Lee over Hidle.

The Board justified its decision for the non-discriminatory reasons that Mr. Lee had demonstrated superior leadership abilities, had performed in an outstanding manner at the school on-the-job, and was immediately available for the position.

In assessing the credibility of the views articulated by the Board, the District Judge listened to the testimony of the witnesses, observed their bearing on the stand, and studied their demeanor. In accepting the explanation by the Board, and adopting its explanation as a finding of fact, the District Court was certainly in the best position to make determinations regarding the credibility of witnesses. As such, these findings of fact by the District Court should not be reversed.

The necessity of a remand is even more pronounced in a case such as this, in which the back pay issue was not addressed at trial because Hidle had the Board to believe that back pay was not claimed. The determination of whether to award back pay is peculiarly within the province of the District Courts. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-416 (1975) this Court stated:

> It is true that back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not for another, and — owing to the structure of the federal judiciary these choices are, of course left in the first instance to the district courts.

This Court then went on to hold that a party might not be entitled to back pay if the other party was prejudiced by a tardy and inconsistent claim for back pay:

> But a party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party. The respondents here were not merely tardy, but also inconsistent in demanding back pay. To deny back pay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII. Id. at 424.

It is clear that the District Court acted within its discretion in denying back pay. The Board had been led to believe that Hidle was not claiming back pay and had not adduced evidence in mitigation, such as interim earnings and "amounts earnable with reasonable diligence". 42 U.S. § 2000e-5(g). The District Judge had heard the case, reviewed the facts *twice*,[7] and decided twice that Hidle had suffered no financial loss. Yet, despite the District Judge's opinion and the prejudice to the Board, the Court of Appeals decreed that Hidle is entitled to back pay. The Eleventh Circuit has circumvented the controlling standard of appellate review by purporting to decide this case on grounds of policy. It is submitted that policy considerations do not entitle an appellate court to determine liability and damages without reference to the facts of the case, and the fact-finding role adopted by the Court of Appeals is clearly erroneous.

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[7]In fact, the District Judge reviewed the case for the third time on remand and recused himself because he concluded again that Hidle had not shown financial loss and he could not reconcile the appellate court's back pay award with the conduct of the case or the facts.

CONCLUSION

The issues raised by this Petition affect the very integrity and efficacy of the Federal District Courts. If the District Court's power to correct error is a function totally dependent on just what issues are raised by a party in a Rule 59 motion, the process of justice will be distorted and frustrated. Even worse, manifested fraud may have to be accepted or ignored by the District Court as in the case at hand if not directly raised by the pleadings. To avoid such regrettable results and resulting miscarriages of justice, this Court should issue a Writ Certiorari, reverse the judgment of the Eleventh Circuit, and remand with directions for further considerations in light of *Mt. Healthy*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari on each counsel for Respondent, namely: Robert L. Wiggins, Jr., Esq., 15th Floor, Colonial Bank Building, Birmingham, Alabama, 35203; and Coleman Hamm, Esq., 9636 Parkway East, Birmingham, Alabama, 35215, by deposit in United States Mail box, first class, postage prepaid and correctly addressed, this the 10 day of December, 1986. All parties required to be served have been served.

Donald B. Sweeney, Jr.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 83V-489-S
GENEVA COUNTY BOARD	)	
OF EDUCATION,	)	
	)	
Defendant.	)	

OPINION

This suit, brought by a female white teacher for alleged sex discrimination in selection of the Assistant Principal at the Hartford Middle School in Geneva County, Alabama, involves a comparison of the lesser academic qualifications of a man selected as Assistant Principal who, at the time of the selection, was employed as a substitute teacher doing most of the work of the Assistant Principal who was ill, as compared to a woman with more academic qualifications who had resigned from employment from the school to take up residence in another city before officially applying for the Assistant Principal's job. It is not disputed that each was doing an outstanding job while employed by the Defendant.

This Court has jurisdiction by virtue of 28 U.S.C. § 1331 for relief pursuant to 42 U.S.C. § 2000e. No question was made as to the propriety of suit or the exhaustion of administrative remedies.

The tests to be applied in cases such as this were well stated by Judge Allgood, sitting with the Eleventh Circuit Court of Appeals, in *Lewis v. Smith,* No. 82-5922, on May 14, 1984:

"In a Title VII case the burden is [initially] on the plaintiff to prove by a preponderance of the evidence a prima facie case of illegal discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection.' Id., at 802, 93 S.Ct. at 1824. The Supreme Court has said that 'the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.' *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 257, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981). Should the defendant carry this burden the plaintiff must then have an opportunity to show that the legitimate reasons offered were not the true reasons but a mere pretext. *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. at 1825. If *** plaintiff successfully shows the court that the stated reason for rejection was in fact a mere cover up for a discriminatory decision, then the plaintiff has met the ultimate burden of proving unlawful discrimination. Id. at 805, 93 S.Ct. at 1825.

'The *McDonnell Douglas* method of proving discrimination is appropriate when discriminatory motive must be inferred from circumstantial evidence. However, if the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. *Bell v. Birmingham Linen Service,* 715 F.2d 1552 (11th Cir. 1983). ***.

"The burden was on [plaintiff] to show by a preponderance of the evidence that [the person hired] would not have been hired absent the discrimination. *** Prior to the Supreme Court decision in *Mt. Healthy City Bd of Ed. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed. 2d 471 (1977), the Fifth Circuit [applied] a clear and convincing standard. Since the *Mt. Healthy* decision, which involved constitutionally protected conduct, even though not a violation of Title VII, this court and the Fifth Circuit have required a showing 'by a preponderance of the evidence' that the plaintiff would not have been hired absent the discriminatory action. Id. at 287, 97 S.Ct. at 576.

Perryman v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983); *Bell v. Birmingham Linen Service*, 715 F.2d 1552 (11th Cir. 1983); *Lee v. Russell County Bd. of Ed.*, 684 F.2d 769 (11th Cir. 1982); *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980). ***.

"[The Court of Appeals] has held that in cases where there is abundant evidence of consistent past discrimination, injunctive relief is mandatory absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law. *NAACP v. City of Evergreen, Ala.*, 693 F.2d 1367 (11th Cir. 1982); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354 (5th Cir. 1977), cert. denied 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781. ***."

The Plaintiff graduated from college in 1972 with a Bachelor of Science degree in science and education; received her Master's degree in science and primary education in 1977; and received an AA Teacher's Certificate shortly thereafter. Later, she received a Master's degree in administration and supervision and had taught for about four years in the Hartford School System before resigning in January, 1982, to leave Hartford and go to Fort Walton Beach, Florida, to accompany her husband in his new job in a move that she described in her letter of resignation as essential for her family life. [Defendant's Exhibit 1].

Mr. Lee, who was accepted for the job of Assistant Principal, was at the time of the selection about 42 years old, having completed 13 years in the United States Army between 1960 and 1972 where he attained the rank of Sgt. Major with outstanding recommendations. Lee resigned from the military in 1972 but returned to the military in 1975, where he remained until 1980 when he returned to Hartford, Alabama, after retiring from the Army. Lee applied for the position of substitute teacher in January or February, 1982. When Mr. Phillips, the Assistant Principal, became ill, Lee began teaching Mr. Phillips' classes at the Hartford Middle School and acting as Assistant Principal, except that he was disqualified by law [since he was not an Assistant Principal] from administering punish-

ment to students or supervising other teachers. In January or February, 1982, Lee inquired of the various principals around Hartford about the availability of a full-time job as a teacher. Lee, having a background of a Bachelor of Science Degree in 1975 and a Bachelor of Science Degree in Education in 1981 and being certified as a secondary teacher, had served in the Army as a senior instructor; had supervised and evaluated four other Army instructors; had taught for eight hours a day for a substantial period in the Army; and had served for four years as a senior instructor. However, Lee had had no experience as a public school teacher until beginning to serve in April, 1982, as a substitute teacher. Lee had, however, begun work on his Master's Degree in administration and supervision so that he would be — and he was — certified with his Master's Degree in administration and supervision in May, 1983, within one year of the time he was selected as Assistant Principal. Mr. Phillips, the regular Assistant Principal, whose place Lee took, was ill a great deal during the 1981-82 school year. In August, 1982, it became obvious that Phillips would not return to school, and he tendered his resignation because of ill health on August 8, 1982. Principal Whittaker, who was Principal of three schools in Hartford and who had assistants in each of the schools, testified that, faced with the problem of the impending opening of school during August, 1982, the Principal, the Superintendent and the County School Board were required to fill the position within a short time. There was little time to advertise the job and they had two satisfactory applicants — Mr. Lee and Plaintiff Hidle — who had generally applied for assistant principalships to the Board theretofore. It was not denied that either of the candidates was highly acceptable and that the Principal, who made the ultimate recommendation, and the Superintendent and Board, who ultimately employed Lee, faced the dilemma of selecting one of the two satisfactory candidates. Lee was on the ground, doing the job, and would be certified with a Master's Degree within one year's time. Plaintiff Hidle, already certified with a Master's Degree, had, within the past eight months, moved away from Hartford in

what she described as a move essential to maintain her family life. However, she was well qualified for the position and professed an interest in returning to Hartford provided she could be an Assistant Principal.

It appeared that the resignation of Mr. Phillips was tendered on or about August 8, 1982, the day before the previously scheduled meeting of the Board of Education, which must ultimately approve any decision. Although there had been rather strong rumors that the resignation was forthcoming for about a week, it apparently reached the Principal's office on the day before the scheduled meeting. Both applicants were well known to the Principal, whose recommendation would ultimately control the selection. This Court, therefore, is of the opinion that there was no occasion for allowing either applicant to further explain his or her personal qualifications. There was, however, a necessity for obtaining from Mr. Lee his professional qualifications, which were somewhat doubtful and needed to be documented. Lee had not, prior to 1982, taught in public schools, and in order to hold a Superintendent-Principal Professional Certificate, Lee must have had at least one year's teaching experience, certified to by a superintendent of schools. [Plaintiff's Exhibit 35, p. 28]. A preponderance of the evidence indicated that the three-year requirement in Plaintiff's Exhibit 35 had been decreased to one year.[1] There was evidence that the requirement of a Master's Degree in Administration and Supervision was simply a desired standard set up by the State Board of Education which enforced the standard only if, after being warned, the employing school did not comply within a period

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[1]Mr. Reeder testified that neither the State Board of Education nor the Southern Association of Colleges and Schools requires three years' experience in teaching in order to be an assistant principal. Reeder testified that one year's experience in teaching was a State requirement for an assistant principal but that, if qualifications could be attained within one year of employment, there were no sanctions against a school for not being in compliance. Reeder stated that there were no written criteria for selection of assistant principals except that they must be teachers and that the State Board required one year's experience in teaching for assistant principals.

of one year. The employing school in this case, of course, did comply within one year by virtue of the certification of Lee after obtaining his Master's Degree in May, 1983, some nine months after his selection in August, 1982.

It appears that, at the time of the selection, (a) Mr. Lee had no degree in elementary education, whereas Plaintiff Hidle had a Master's Degree; (b) Mr. Lee had no double AA Certificate, whereas Plaintiff Hidle had one; and (c) Mr. Lee had no experience in public school teaching except five months as a substitute teacher, whereas Plaintiff Hidle had taught in Alabama schools for more than four years. On the other hand, Mr. Lee was older and had been a Senior Instructor in an administrative and supervisory capacity over other Army instructors for four years and was enrolled in an educational program which would qualify him within one year for a Master's Degree in educational administration and supervision. Mr. Lee, in addition to having done an outstanding job as a substitute for the Assistant Principal he ultimately replaced, had most outstanding recommendations from his period of service in the Army, including that as a teacher and supervisor of teachers. Plaintiff Hidle's only experience in administration and supervision was on-the-job training required in order to obtain her certificate in college. However, she had done some work in the central office while on sick leave and claimed that she had some supervisory experience in looking over teachers' plans and in reviewing applications for federal funds in the central office. Superintendent Reeder was favorably impressed with her work in the central office. Plaintiff Hidle tendered her resignation on January 7, 1982, by a letter which shows that her resignation was due to a transfer received by her husband and her feeling that "a close family unit is essential in the environment I wish for my children." [Defendant's Exhibit 1]. Obviously, while she would return to Hartford for the promotion to assistant principal, she preferred to work in Florida where her husband's job was.

The selection in this case must be considered in light of the surrounding circumstances tending to indicate discrimination

against females. There was evidence that at least two females, inclusive of the Plaintiff, had applied for assistant principalships in the Geneva School System while Superintendent Reeder had been superintendent, and there was little evidence that either of them had been carefully considered. However, it was not shown to what extent the other female applicant was qualified as compared to other applicants and it was not shown how many qualified male applicants had applied. It is somewhat significant that, of the seven jobs as principal or assistant principal within the Geneva County System, six are occupied by men and one is occupied by a woman. This Court is of the opinion that statistics attain their significance proportionately to the number of positions considered and that these statistics are of little significance because the number of such jobs in Geneva County is small and the statistics do not include a comparison of the qualifications of the people applying for the various jobs. Most of the teachers, however, are female and six of the seven administrators are male.

Principal Whittaker, whose recommendation controlled the appointment in question, testified that Lee had made his interest in teaching known, and when Mr. Phillips' absenteeism became a problem, Mr. Whittaker employed Lee at $17.50 a day. About January, 1982, Mr. Whittaker monitored Lee's work each day and found it highly satisfactory and also found that Lee was a good leader whom others followed. Whittaker found that, whereas Phillips had caused some disciplinary problems in the Hartford Middle School by his absence, Lee's presence was an excellent influence on all at the Hartford Middle School. Whittaker further testified that, when he learned in early August, 1982, that Mr. Phillips would resign, the only applicants known to him were a Mr. Daniels (who withdrew his interest), Mr. Lee and Plaintiff Hidle. It appeared that another female had applied to the superintendent, but it was not shown whether or not she was qualified or whether she was still an applicant at the time of the selection. Mr. Whittaker testified (1) that he had some reservations about whether Plaintiff had the ability to lead the faculty in the school and

that Lee had shown he could do so; and (2) that Lee was punctual, dependable, had the ability to lead and had excellent military recommendations. Whittaker knew of no experience which Plaintiff had as a supervisor of other teachers. Whittaker did not call Plaintiff in to ask her about any supervisory experience that she had had because he thought he knew her background.

It may be significant that in Mr. Whittaker's deposition, p. 73, he appears to have stated that he wanted a man for the job, but it appears on the following pages that what he was attempting to say was that he knew the applicants and wanted the man [Lee] because he wanted a strong disciplinarian and knew Lee could handle it. Whittaker stated in his deposition, p. 76: "I said a strong disciplinarian. I didn't say just a man." However, at pages 73-74, Whittaker said that, because of working conditions – the majority of the faculty being women and one of his three assistant principals being a woman – he wanted a man.

Superintendent Reeder testified that he agreed with Mr. Whittaker that Lee was doing an exceptional job, and in weighing the applications of Mr. Lee and Plaintiff Hidle, Mr. Reeder considered the fact that Plaintiff had done a fine job and had impressed all favorably while she was a teacher at Hartford. The only negative situation was that Plaintiff was not living in Geneva County, and Mr. Reeder was concerned about whether Plaintiff really wanted to teach and return there in view of her resignation during mid-term of the former year for family reasons.

Mr. Reeder testified that he ordinarily would have discussed this appointment with all of his principals and would have posted the opening on the bulletin boards in the schools so that all teachers might consider it. Mr. Reeder stated that he did not do this on this occasion because of the shortness of time between the resignation on August 8, 1982, and the opening of school in August, 1982. Mr. Reeder admitted that he had had no opportunity to observe Plaintiff Hidle in supervisory situations but was favorably impressed with what he saw of Lee's supervision of others. Mr. Reeder admitted that he did not

offer Plaintiff a job as a substitute teacher for the Assistant Principal. This Court does not consider this to be a factor since there was no reason to believe that Plaintiff would return to Hartford to commute from Fort Walton Beach (some two hours each way) for the $17.50 per day paid a substitute teacher in Geneva County.

Plaintiff then called Ms. Pamela Williamson, Graduate Registrar at Troy State University where both Plaintiff and Mr. Lee had obtained most of their educational background. Ms. Williamson testified that Lee had met the requirements for a teacher's certificate prior to his selection as assistant principal and that he met all the requirements for assistant principal by August, 1983, within a year of his appointment. Ms. Williamson testified, however, that Plaintiff had substantially better academic qualifications for the assistant principalship. Ms. Williamson testified that it was not considered an acceptable educational practice to select non-certified people when a certified candidate was available; that, in the educational field, normally military experience is not considered; and that she considered Plaintiff the better qualified candidate for the subject office. Ms. Williamson admitted, however, that she had no knowledge of Mr. Lee's Army teaching experience or personal qualifications and she admitted that leadership would be important.

Plaintiff's attorney argued that the Defendant Board, in answering interrogatories (particularly No. 4), did not indicate dependability or leadership as a factor in making their selections. He also argued that the answers to Interrogatories No. 3 through 16 tended to show that, at the time of answering the interrogatories, the Defendant was not cognizable of any factors which were superior in Lee over Plaintiff. This Court simply does not agree; the questions were answered simply, directly and without embellishment. Plaintiff's attorney sought to imply that Defendant, upon reflection at or near the trial, had suggested reasons for selection of Lee which were not suggested earlier.

Some of the evidence in this case, i.e., the statement by Principal Whittaker that he wanted a man for the job, if it stood

alone, would be direct evidence of discrimination which, if given full credit by the fact-finder, would satisfy the requirement of intentional discrimination. *Bell v. Birmingham Linen Service*, 715 F.2d 1552 (11th Cir. 1983). The statement, however, was weakened somewhat by Principal Whittaker's later statements that he needed a disciplinarian such as he knew Lee to be.

The parties in this case concurred that very few women have been employed as administrators or supervisors by the Board of Education of Geneva County, though most of its employees are women. While there was no comparison of the qualifications of these employees, this may be abundant evidence of consistent past discrimination sufficient to require injunctive relief absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law. *NAACP v. City of Evergreen*, 693 F.2d 1367 (11th Cir. 1982). A showing of significant disparity raises an inference that employment decisions are tainted by illegitimate concerns. The defendants, in order to prevail, must then either discredit the plaintiff's case or show that the challenged practice was necessary for the performance of the job. *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982). This the Defendant cannot do, as it agreed that Plaintiff Hidle was well qualified for the job. It is admitted that the Defendant had adopted no official policy or objective criteria to be utilized in selecting assistant principals among candidates. Such a policy is a discriminatory practice in this circuit. *Watson v. N. L. Services*, 686 F.2d at 877, 881.

The Plaintiff's evidence in this case is not at all overwhelming, and this Court is reluctant to substitute its judgment in a close case for that of the professional State employee to whom the job is delegated. However, the Court is of the opinion that, pursuant to the law of this Circuit, the Plaintiff has established her case by the preponderance of the evidence in the case and that, accordingly, she is entitled to prevail.

In her complaint, Plaintiff requested damages in an amount to be proven at trial. After reviewing the evidence presented

by Plaintiff at the May 29, 1984, proceeding, however, it appears to this Court that Plaintiff has failed to establish to what extent, if any, she has been damaged.[1] The Court is of the opinion, however, that Plaintiff is entitled to a mandatory injunction directing Defendant to offer Plaintiff in good faith the next vacant assistant principalship to occur in either the Hartford or Coffee Springs School Systems.

An Order will be entered in accordance with this Opinion.

DONE this 2nd day of July, 1984.

/s/ R. E. VARNER

United States District Judge

[1]Plaintiff's evidence that assistant principals are paid $506.00 a year more than teachers with similar qualifications in Geneva County is little help to her in view of her failure to show her earnings elsewhere and her failure to show what it would have cost Plaintiff to commute the two hours each way to and from where she chose to live and her job. Plaintiff's evidence was simply not sufficient to show that she suffered financial damage as a result of Lee's selection.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 83V-489-S
GENEVA COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendant offer Plaintiff in good faith the next vacant assistant principalship to occur in either the Hartford or Coffee Springs School Systems.

It is further ORDERED by this Court that all other relief requested by Plaintiff in her complaint is hereby denied.

It is further ORDERED by this Court that the costs of this action are hereby taxed against the Defendant, for which execution may issue.

DONE this 2nd day of July, 1984.

/s/ R. E. VARNER

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 83V-489-S
GENEVA COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

OPINION AND ORDER

This cause is submitted on Plaintiff's motion filed July 11, 1985, to alter and amend the Order entered by this Court on July 2, 1984, and on Plaintiff's motion filed July 16, 1984, for attorneys' fees and expenses. This Court has spent a great deal of time attempting to carefully weigh the evidence for both sides on this case and originally was of the opinion that Plaintiff, a female former teacher for Defendant Board of Education, was discriminated against because of her sex when a male teacher was selected as Assistant Principal at the Hartford Middle School in Geneva County, Alabama. The reason for this determination was that, while both applicants were well qualified for the job, the Plaintiff was educationally better qualified than the successful applicant and that, while most of the employees of the Geneva County Board of Education are female, only one of all the principals and assistant principals in Geneva County are women.

Plaintiff's motion filed July 11, 1984, to amend the Order to include damages for the Plaintiff has caused this Court to review all of the evidence to determine what evidence there was in regard to damages and to what extent the matter was

either litigated or ignored during the trial of the case. First, the Court reviewed the statement of agreed and disputed facts filed by the parties about 30 days prior to the trial in conformance with the Pretrial Order. That statement contained no reference to damages, and it was signed by the attorneys for both parties. As pointed out by the Plaintiff in brief, there was on file an exhibit containing a report of the annual salary of Plaintiff before she left the employ of the Geneva County Board of Education and a statement in evidence that an assistant principal is paid $500.00 more a year than is his comparable teaching salary, but there is no evidence that she lost anything because of her change. This Court was well aware from the evidence in the case that the Plaintiff had left the Geneva County Board of Education some eight months before the selection of the Assistant Principal in question, stating that it was necessary to her family life that she move with her husband and family to Florida; that Florida reputedly pays teachers more than does Alabama; and that Plaintiff did some work in Florida. The Court, therefore, from the evidence offered at the trial of this case formed the opinion that Plaintiff went to a higher paying job in Florida and was not financially damaged by Defendant's failure to employ her. Plaintiff had the burden of proving that she actually lost money or was otherwise damaged by the selection. Public policy demands that a litigant be given only one day in court. *Hooper v. United States,* 326 F.2d 982, 164 Ct. Cl. 151, cert. den. 377 U.S. 977, 84 S.Ct. 1882, 12 L.Ed.2d 746.

The review of the evidence and of this Court's Opinion in this case has, however, convinced this Court that it misapplied the test set out by the Eleventh Circuit Court of Appeals in *Lewis v. Smith,* No. 82-5922, on May 14, 1984. In that opinion, the Court pointed out a further modification to the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, test in certain instances and requires a showing by a preponderance of the evidence that the person hired would not have been hired absent the discrimination. This was an adaptation derived from the Supreme Court decision in *Mt. Healthy City Board of Edu-*

cation v. Doyle, 429 U.S. 274, 287. This Court's Opinion entered July 2, 1984, does not consider that aspect of the test specifically and to that extent it is erroneous and must be amended.

Plaintiff had, shortly before applying for the Assistant Principal job, asked the Defendant to allow her to terminate at mid-term her contract to teach for the school year because her husband was moving to Florida and because it was necessary to her family life that she move with him. Defendant learned of the permanent disability of the incumbent Assistant Principal about the first week in August and needed an Assistant Principal to go to work before the impending opening of school. Mr. Lee, the successful applicant, was on the job, doing it outstandingly, and had demonstrated to the Principal and to the Superintendent a leadership not displayed by the Plaintiff, and there was doubt that Plaintiff really wanted to teach in Geneva County.

In enumerating the factors in this Court's Opinion of July 2, 1984, the Court did not consider the question of whether, had Mr. Lee and the Plaintiff been of the same sex (so that there was no sexual discrimination), would Mr. Lee nonetheless have been given the job. The evidence in this case convinces this Court that Mr. Lee would have been given the job even if both parties had been of the same sex. Mr. Whittaker, the Principal, made the selection. He had supervised both Mr. Lee and the Plaintiff. The Assistant Principal who held the job had for a year been disheveled, he smoked heavily, he drank a great deal of coffee, he was often A.W.O.L. or late to class, he stated to Mr. Whittaker that if he acted strangely he had to go to a hospital in Pensacola as he was trying to get off of his medicine. Mr. Lee applied for and received a position as a substitute teacher and, during the Assistant Principal's absence, Mr. Lee was regularly in attendance as substitute for the Assistant Principal. Mr. Lee was qualified to teach and taught the classes that the Assistant Principal was suppose to teach and he proved to be an excellent substitute, a good leader and a person that others followed without hesitation. Mr. Lee's recom-

mendations from the Army were excellent, and his adaptation to the job was highly satisfactory. During the same winter, Plaintiff notified Mr. Whittaker that her husband was being transferred to Fort Walton, Florida, and that it was necessary that she move to Fort Walton and necessary to her marriage that she be in Fort Walton with her husband. Mr. Whittaker disagreed with Plaintiff's statement that she offered to work for the remainder of her one-year contract. Plaintiff's letter of resignation would also indicate otherwise. In August, when the Principal and the Superintendent of Education learned of the resignation of the Assistant Principal, Plaintiff was still living in Fort Walton, a two-hour trip from the school, and Mr. Lee was on hand at the school still serving as a substitute teacher but ready, willing and very obviously able to do permanently the job which he had been temporarily doing the former spring. Mr. Lee was ready to go to work and the building needed some clean-up prior to the impending opening of the school. The Principal had never seen Plaintiff's ability to lead the other teachers in the school and had some reservations about her ability to do it in spite of the fact that he knew that she was an excellent teacher. Lee was also an excellent teacher and had demonstrated amply his ability to lead the other teachers, he was punctual, dependable and had excellent military recommendations. While he did not have the scholastic achievements of Plaintiff at that time, he had taught in the military service and had far more general teaching experience than did Plaintiff. Principal Whittaker knew that Lee was a strong disciplinarian, both from his military background and from the demonstration that Lee had made in successfully replacing the Assistant Principal while acting as a substitute teacher.

The Superintendent of Education testified that he talked with Principal Whittaker about replacing the Assistant Principal; they discussed both Plaintiff and Mr. Lee; Plaintiff had done a fine job and had impressed both of them favorably as a teacher in their school; and Mr. Lee had done an outstanding job as teacher in the very subjects for which they needed a teacher and had demonstrated his leadership ability with stu-

dents and the other teachers while serving only as a substitute teacher. The Superintendent further testified that the only negative situation about Plaintiff was that she was not living in Geneva County, and he was concerned about whether she really wanted to teach there. That concern was well justified in view of the fact that Plaintiff had, during the immediately preceding year, resigned at mid-year to go to Florida saying it was necessary for her family relationship since her husband was being transferred to Fort Walton. It was most reasonable for the school officials, after Plaintiff left her job at mid-term in the preceding school year, to doubt that she would have returned and commuted several hours a day for an additional $500.00 a year. Plaintiff's letter of resignation would indicate that she felt that it was essential to her family relationship that she go to such place as her husband might be transferred to. Yet, within a few months, she had reapplied for a job with the Geneva County Board of Education. It was reasonable to conclude that Plaintiff was coming back to Geneva County as a temporary matter for the purpose of establishing a base as an Assistant Principal from which she could better apply for a better job to other places where her husband might be assigned. This Court, therefore, concludes that the preponderance of the evidence in this case indicates that Mr. Lee would have been hired whether or not there may have been discrimination on the basis of sex. There was no showing that discrimination was a proximate cause of Plaintiff's not being hired.

While the preponderance of the evidence, in the opinion of this Court, demonstrates that the Defendant has been discriminating against females in the appointment of their administrative and supervisory employees, the evidence fails completely to show that this discrimination was the reason for Plaintiff's failure to be appointed as Assistant Principal. The Opinion of July 2, 1984, therefore, is hereby ORDERED amended to the extent hereof. Said Opinion shall otherwise remain in full force and effect.

It is further ORDERED by this Court that the Order en-

tered in this cause on July 2, 1984, is hereby set aside and Judgment will be entered in favor of the Defendant.

It is further ORDERED by this Court that Plaintiff's motion filed herein July 11, 1984, to alter and amend is hereby denied.

It is further ORDERED by this Court that Plaintiff's motion filed herein July 16, 1984, for attorneys' fees and expenses is hereby denied.

DONE this 8th day of February, 1985.

/s/ R. E. VARNER

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 83V-489-S
GENEVA COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the Opinion and Order entered in the above-styled case on this date, it is

ORDERED, ADJUDGED and DECREED by this Court (1) that Plaintiff take nothing by her complaint herein; (2) that Judgment is hereby entered in favor of the Defendant and against the Plaintiff in this cause of action; and (3) that costs of this action are hereby taxed against the Plaintiff, for which execution may issue.

DONE this 8th day of February, 1985.

/s/ R. E. VARNER

United States District Judge

A-20

Maryann H. HIDLE, Plaintiff-Appellant,

v.

GENEVA COUNTY BOARD OF EDUCATION,
Defendant-Appellee.

No. 85-7171.

United States Court of Appeals, Eleventh Circuit.

July 3, 1986.

Rehearing and Rehearing En Banc
Denied Aug. 11, 1986.

Following judgment for plaintiff in sex discrimination case involving school board's hiring of administrative personnel, the plaintiff moved to amend judgment for back pay and an order installing her in subject position. The United States District Court for the Middle District of Alabama, Robert E. Varner, J., set aside prior decree and entered judgment for the board, and plaintiff appealed. The Court of Appeals, Daniel Holcombe Thomas, Senior District Judge, sitting by designation, held that assuming power to alter or amend a judgment to benefit a nonmoving party the District Court abused its discretion in instant case.

Reversed and remanded.

Federal Civil Procedure

Assuming that district court may alter or amend a judgment to benefit a nonmoving party when the moving party has sought to alter or amend, the trial court abused its discretion in entering a new judgment for defendant board of education on motion by unsuccessful applicant for principalship to amend sex discrimination judgment to include back pay and for order installing her in subject post; board filed no postjudgment motion and order was entered eight months after filing of motion. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ. Proc.Rules 59, 59(d), 28 U.S.C.A.

Robert L. Wiggins, Jr., Coleman D. Hamm, Jr., Birmingham, Ala., for Maryann H. Hidle.

Donald B. Sweeney, Jr., Birmingham, Ala., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, VANCE, Circuit Judge, and THOMAS,* Senior District Judge.

DANIEL HOLCOMBE THOMAS, Senior District Judge:

This is a sex discrimination case.

At issue in this case is whether a party's motion to alter or amend a judgment pursuant to Rule 59 F.R.C.P. empowers the district court to, in effect, vacate a judgment in favor of the moving party so as to rule in favor of the non-moving party.

Because we are not addressing the merits on this appeal, only a brief summation of the facts necessary for disposition of the procedural issues are presented here.

Suit was filed on March 28, 1983, alleging that the defendant, Geneva County Board of Education had established a pattern and practice of "[f]avoring males over females in its hiring for supervisory and administrative . . . positions and particularly by denying employment to plaintiff because of plaintiff's sex (female)." The pretrial order required that the parties exchange a statement of agreed facts prior to trial so that the factual disputes to be tried were as narrow as possible. After trial, the district court took the case under advisement and subsequently issued a written opinion on July 2, 1984, in which it found that the defendant violated Title VII of the Civil Rights Act of 1964 by refusing to hire plaintiff, Maryann H. Hidle, for an assistant principal's position because of her sex. Although plaintiff was not awarded back-pay, the district court did grant a "mandatory injunction directing the defendant to offer plaintiff in good faith the next vacant assistant principal-

*Honorable Daniel H. Thomas, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

ship to occur in either the Hartford or Coffee Springs school systems.

After the judgment was rendered, plaintiff timely filed on July 11, 1984, a motion to alter and amend judgment pursuant to Rule 59 F.R.C.P. In the motion plaintiff raised only the question of back-pay and failure to immediately instate her into the job she was originally denied.

Oral argument was granted and thereafter, the Court took the motion under advisement. On February 8, 1985, the Court denied plaintiff's motion to alter and amend, set aside the July 2nd order and entered judgment in favor of defendant. Citing, *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977).

On appeal, plaintiff argues that the district court lacked authority to vacate its original order because defendant never filed a motion contesting the district court's liability determination and, as previously stated, plaintiff's motion merely contested the remedies awarded to her. Because the Court *sua sponte* entered a new opinion seven months after the original entry of judgment, plaintiff contends the Court acted without authority for failing to comply with Rule 59(d) F.R.C.P. which allows a court to act on its own initiative only if it does so within 10 days after entry of judgment.

This is an unusual if not unique case. The district court, despite its expressly stated reluctance to substitute its judgment for that of the school hiring authority, found that plaintiff was the victim of sex discrimination in hiring and granted injunctive relief requiring that plaintiff be offered the next vacancy. The court did not grant her backpay or instatement into the job she was denied. Under the court's judgment of July 2, 1984, she was at least presumptively entitled to both. *Nord v. United States Steel Corp.,* 758 F.2d 1462 (11th Cir.1985); *Darnell v. City of Jasper, Alabama,* 730 F.2d 653 (11th Cir.1984); *Marks v. Prattco,* 633 F.2d 1122 (5th Cir. Unit A 1981); *McCormick v. Attala County Board of Education,* 541 F.2d 1094 (5th Cir.1976).

On July 11, 1984, plaintiff filed a motion to alter or amend

the judgment seeking backpay with interest, instatement into the position denied, injunction against further discrimination, and frontpay for any interim period pending instatement into the position denied. In connection with the claim for backpay, she sought correction of the district court's theory that she had failed to show the extent to which she had been damaged because she had failed to show her interim earnings in other employment, contending that this burden of proof was upon the defendant.

The defendant filed no post-judgment motion asking that the judgment be altered or amended (or for a new trial). Seven months later, February 8, 1985, the court denied plaintiff's motion, set aside the judgment in her favor, and entered judgment for the defendant.

Because of the rarity of this situation we do not attempt to lay down a rule concerning the power of the court to act at all to alter or amend a judgment to the benefit of a non-moving party when the moving party has sought to alter or amend under F.R.Civ.P. 59(e). Rather, assuming the district court has such power, we conclude that in this case it abused its discretion.

Strong policy considerations militate against what occurred here. The court had at least arguably erred in denying backpay, job instatement, and injunctive relief against future discrimination, as well as in assigning the burden of proof of mitigation. When plaintiff sought to present these matters as a basis for altering or amending the remedies afforded her, she lost her judgment to the defendant who had not asked any post-judgment relief. This inhibits the error-correcting function of a Rule 59(e) motion. If the district court is correct, a successful plaintiff given a less-than-complete remedy could not ask for correction without putting at risk the judgment in her favor though the party cast in judgment has raised no question of the validity of the judgment. A defendant successful on five claims cannot safely seek for correction concerning claim six.

The *Mt. Healthy* issue, on the basis of which the trial court

reversed itself, was neither pleaded by the defendant nor referred to in the pre-trial order.

The lapse of time is of real concern. This court has held, in *Burnam v. Amoco,* 738 F.2d 1230, 1232 (11th Cir.1984), that where no motion has been filed by either party a district court has a limited power to act *sua sponte* to alter or amend a judgment so long as done within ten days after the judgment is entered. If *Burnam* controls, the district court here exceeded its authority because of the eight months' delay. Here a motion was made by plaintiff. Possibly the filing of a motion by a party opens up the judgment to a greater extent than the court itself can open it up without a motion. Nevertheless, the interest of the parties and society in the finality of judgments, and the legitimate expectation of the parties concerning the judgment to the extent it is not questioned by the parties, speak against pulling the rug from under the plaintiff eight months after she filed her motion to correct errors in the remedy granted her.

The judgment is REVERSED and the case REMANDED to the district court with instructions to reinstate the judgment for plaintiff as originally granted and to grant plaintiff the relief requested in her motion to alter or amend, namely: "restore her to the position she would have occupied in the absence of the violation of Title VII, pay her back-pay with interest and enjoin further violation of Title VII by the defendant."

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7171

D. C. Docket No. 83-489

MARYANN H. HIDLE,

Plaintiff-Appellant,

versus

GENEVA COUNTY BOARD
OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Alabama

Before GODBOLD, Chief Judge, VANCE, Circuit Judge, and THOMAS*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court with instructions in accordance with the opinion of this Court;

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*Honorable Daniel H. Thomas, Senior U. S. District Judge for the Southern District of Alabama, sitting by designation.

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 3, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: Aug. 20, 1986.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
August 11, 1986

TO ALL PARTIES LISTED BELOW:

NO. 85-7171 HIDLE v. GENEVA COUNTY
BOARD OF EDUCATION

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

___ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

XX No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

Miguel J. Cortez, Clerk
By: /s/ SANDRA L. SEABURY
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 83V-489-S
GENEVA COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This cause is now before the Court on the Opinion of the United States Court of Appeals for the Eleventh Circuit dated July 3, 1986, issued as Mandate on August 20, 1986, and filed in the Office of the Clerk of this Court on August 22, 1986, and on the Plaintiff's motion filed herein August 25, 1986, to enforce Mandate.

Calculation of damages in this case has long been a difficult problem to this Court. Plaintiff now argues that, had she been given the assistant principal position, she would have been paid $19,392.00 annually or $500.00 annually more than she would have earned had she not resigned. That resignation was voluntary and it occurred several months prior to Plaintiff's claim of any mistreatment. It has been difficult for this Court to find that Plaintiff is entitled to damages, including a salary for a job from which she resigned prior to any alleged wrongdoing of the Defendant. It is especially difficult when Plaintiff's actual earnings during her absence are not considered at all.

This case was not tried as a back-pay or damage suit. Although Plaintiff claimed back pay in the complaint, this Court, and apparently the Defendant, were led to believe by subse-

quent actions of Plaintiff's attorney that back pay was not a part of the Plaintiff's claim. Paragraph 5 of this Court's Pretrial Order of March 26, 1984, required Plaintiff to file a statement of agreed and disputed facts proposed to be proved by Plaintiff in support of "her claim as to liability and damages". That statement was filed on May 27, 1984, and it contained *no* reference to back pay, salary or monetary damages. Those items were not mentioned during the trial. In the opinion of this Court, this case was a marginal case for any relief at all, and Plaintiff's attorney tried the case seeking only a job as assistant principal, not back pay, damages or anything of the sort. Both the pretrial statement and the oral evidence offered at trial demonstrate this. Only a deposition mentioned money and that demonstrated only that Plaintiff would have been paid as assistant principal about $500.00 more annually than she would have received as a teacher had she not voluntarily abandoned her Geneva County job in the middle of the term some few months before she applied for the assistant principal position. Had back pay been an issue in this case, this Court would have had a duty, pursuant to 42 U.S.C. § 2000e-5 (g) , to consider, not only interim earnings, if any, but also amounts earnable with reasonable diligence. As sparse as evidence of back pay due is, Plaintiff's statement that she would have returned to Geneva County for the assistant principal position, coupled with the fact that she did not seek her old Geneva job, is at least some evidence that she did not seek to mitigate damages by seeking "amounts earnable with reasonable diligence".

Plaintiff's nonevidentiary affidavit of August 28, 1984, shows Plaintiff's earnings to have been $5,587.72 in 1983 and $12,207.02 from January, 1984, until July 23, 1984. That salary plays no part of damages calculations pursuant to the formula set by the Court of Appeals. The only other evidence of damages is that as assistant principal Plaintiff would have made $500.00 more annually than she was paid before she resigned — shortly before the assistant principal position became open. [See this Court's Opinion and Order dated February 8, 1985, p. 2]. Instead, the Court of Appeals' Mandate complies with

Plaintiff's claim expressed in her Motion to Alter and Amend Judgment Pursuant to F.R. Civ. P. 59 filed July 11, 1984, which shows the totals of her base salary and assistant principal supplement to have been $38,784.00 for the school years 1982-83 and 1983-84. Salaries for two more years (presumably another $38,784.00) have now accumulated and still the Appellate Opinion makes no allowance for what Plaintiff may have been paid for another job. The Opinion of the Court of Appeals, as this Court understands it, requires back pay from the summer of 1982 until Plaintiff is hired as assistant principal at Hartford with no opportunity for the Defendant to show mitigation of these "damages" that accrued even after the last hearing in this case.

This Court cannot escape the conclusion that Plaintiff's attorney brilliantly (but deceitfully) planned that program in order to encourage Defendant's attorneys to think Plaintiff sought no back pay and, therefore, to offer no evidence of mitigation. Certainly this Court and possibly the Defendant were led to so believe.

Nonetheless, the Plaintiff has succeeded in convincing the Court of Appeals that Plaintiff is entitled to her full back salary for over four years with no deduction — even for pay from Geneva County she would have received as a teacher had she not breached her contract and resigned during the annual term of her contract. Because this writer is personally unable to accept the rationale of the Court of Appeals as to the back pay issue and because this writer thinks the Plaintiff and/or her attorney have perpetrated a fraud on the Court of Appeals and on the Defendant, this writer is not unbiased in the case and, therefore, should, and hereby does, recuse himself from further consideration of the case.

It is ORDERED that the above-styled cause of action be reassigned to another Judge.

DONE this 3rd day of September, 1986.

/s/ R. E. VARNER

United States District Judge

Maryann H. Hidle
Route 2 Box 422
Hartford, Alabama 36344
January 7, 1982

Geneva County Board of Education
Geneva County Courthouse
Geneva, Alabama 36340

Dear Sirs:

Due to a transfer received by my husband, I present this letter of resignation. Because the Geneva County school system has been such an important influence on my life, this decision has been a hard one. I do feel, however, that a close family unit is essential in the environment I wish for my children.

For these reasons please consider termination of my contract effective January 27, 1982. I am proud to have served you and my students these past five years.

Sincerely,

/s/ MARYANN H. HIDLE

Maryann H. Hidle

APPLICATION FOR TEACHING POSITION

Please Fill In and Return To

GENEVA COUNTY BOARD OF EDUCATION
Geneva, Alabama

NOTE: Complete this application in your own handwriting.

A. PERSONAL INFORMATION

1. Name Maryann H. Hidle
   (As it appears on your social security card)

* * *

F. WORK DESIRED

(If an elementary teacher, state grades in order of preference and subjects in order of preference for department assignment. If a high school teacher, state subjects in order of preference.)

I prefer 4th grade language arts.

I am prepared to teach or supervise or to administrate.

* * *

FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-968

IN THE

Supreme Court Of The United States

October Term, 1986

GENEVA COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARYANN H. HIDLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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28 pp

QUESTIONS PRESENTED FOR REVIEW

1. In view of the fact that the question presented by the Petitioner concerning jurisdiction of the district court was not decided by the Court of Appeals, should this Court grant *certiorari* to review such an undecided question?

2. In view of the fact that the Court of Appeals did not decide that district courts lack the jurisdiction to reverse their own judgments *sua sponte* but only decided that in the unusual circumstances of this one case the district court abused its discretion, is there any possible conflict with the law of the Fourth Circuit which has never decided this issue?

3. In view of the fact that the defendant's articulated reasons for its treatment of the plaintiff were found by the district court to be pretextual and unworthy of credence and the defendant never suggested that this was error or otherwise challenged the resulting judgment against it, did the Court of Appeals correctly hold that the district court abused its discretion by *sua sponte* reversing the plaintiff's judgment seven months after it was entered because of an erroneous belief that the same reasons that were already rejected as unworthy of credence could be nonetheless credited under the guise of deciding whether the same decision would have been reached in the absence of the pervasive sex discrimination found to exist?

4. Is a determination that the district court abused its discretion controlled by the "clearly erroneous" standard of F. R. Civ. P. 52 (a) when that determination is based solely on questions of law and the policies which favor the finality of judgments?

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MARYANN H. HIDLE,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

This lawsuit was timely filed on March 28, 1983 alleging that the defendant had established a pattern and practice of "[f]avoring males over females in its hiring for supervisory and administrative (specifically, Assistant Principal) positions, and particularly by denying employment as an Assistant Principal to plaintiff because of [her] sex." After trial, the district court found that the defendant violated Title VII of the Civil Rights Act of 1964 by refusing to hire the plaintiff for an Assistant Principal's position because of her sex. A.1-11 & 13.

The district court concluded, however, that the plaintiff should receive injunctive relief but not back-pay because the

plaintiff failed to prove her interim earnings after the date she was rejected for hire.

The defendant filed no post-trial motions challenging the judgment entered against it, but the plaintiff filed a motion which was directed solely at the issue of remedies. The plaintiff's motion pointed out to the district court that she had in fact proven her back-pay through documentary exhibits received in evidence at trial. At a hearing on the plaintiff's Motion To Alter and Amend Judgment, *both parties* were permitted to offer additional evidence on the back-pay issue. Out of an abundance of caution, the plaintiff *reproved* the amount of pay she would have received from the defendant and proved the interim earnings she had received since she was rejected by the defendant, even though she contended the defendant carried the burden of proof on the latter issue. (Tr. 220-237). The defendant offered no evidence at the hearing. At the close of the hearing, District Judge Varner stated that it was his decision to "leave [the original decision] as it is". (Tr. 238). Judge Varner explained his decision as follows: "I think equity requires that I give her something, but I don't think it requires giving her that much". (Tr. 238-239). He then denied *all* back-pay and attorney's fees, but left the injunction standing. (Tr. 238-239).

Five months later a formal Opinion and Order was entered. (A. 13-18). Even though the defendant had not filed any post-trial motions or challenges to the judgment entered against it, the district court *sua sponte* reversed its original judgment and ruled entirely in the defendant's favor. Although the district court continued to insist that the burden was on the plaintiff to prove interim earnings, that ruling became academic when the court went further and held that the plaintiff was not entitled to prevail even on the issue of liability. (A. 13-18). The court reasoned that it had failed in the original finding of sex discrimination to apply the *Mt. Healthy* "same decision" test. (A. 13-18). In fact, however, the original findings explicitly recited the *Mt. Healthy* standard and implicitly applied it by holding that the defendant's articulated reasons for the plain-

tiff's treatment were pretextual and unworthy of credence. (A. 1-11). Thus, there were no "mixed motives" because the defendant's explanation for its motives were rejected (A. 13-18). Even though the defendant had never raised the *Mt. Healthy* issue *at any point* in the history of the case, the district court resurrected this question *sua sponte* on the mistaken belief that the *Mt. Healthy* issue was an independent element of proof which allowed the trial court to credit facts and reasons which had already been found to be discredited as pretextual and unworthy of credence in the same case.

The respondent filed a timely appeal. The Court of Appeals found that the present case was "an unusual if not unique case". (A. 22). The Court below stated that "[b]ecause of the rarity of this situation we do not attempt to lay down a rule concerning the power of the Court to act at all to alter or amend a judgment to the benefit of non-moving party when the moving party has sought to alter or amend under F. R. Civ. P. 59 (e). Rather, assuming the district court has such power, we conclude that in this case it abused its discretion." (A. 23-24). The Court of Appeals held that, in the limited context of this case, the strong policy considerations in favor of the finality of judgments, and the avoidance of disincentives to the correction of error in the trial courts, required that the original judgment entered in the plaintiff's favor not be disturbed *sua sponte* in the absence of a challenge to that judgment from the defendant itself. (A. 23-24).

On remand, the original trial judge recused himself because he believed that the plaintiff's attorney had deliberately failed to prove the plaintiff's interim earnings in an effort to deprive the defendant of an opportunity to prove such earnings. (A. 30). The district court ignored the fact that plaintiff had proven her interim earnings prior to the appeal through her testimony and the introduction of her tax returns during the hearing on August 28, 1984. (Tr. 220-237). Nevertheless, the original district judge recused himself because of his bias and his mistaken belief that he was compelled to award the plaintiff back-pay without deduction of interim earnings as a result

of the Court of Appeals' decision. (A. 30). The new district judge assigned this case promptly resolved this mistaken belief by entering an order which allowed the defendant to deduct the full interim earnings of the plaintiff. This Order was omitted by the defendant's Petition but is attached hereto in the Supplemental Appendix. The defendant's repeated references to the original district judge's mistaken belief that the plaintiff's attorney had deliberately failed to prove the plaintiff's interim earnings is misleading without the additional fact that the new district judge allowed the deduction of all interim earnings on the basis of the proof of such earnings *by the plaintiff's attorney before the appeal.* (Supp. App.; Tr. 220-237).

FACTS

The petitioner has had a longstanding pattern and practice of selecting males and rejecting females for administrative and supervisory positions. In the district court's original findings of fact, a pattern and practice of favoring males and disfavoring females in the selection of administrators and supervisors was found to exist. (A. 10 & 13). In the Opinion entered after the original judgment, the district court adhered to its original finding by holding that "the preponderance of the evidence, in the opinion of this court, demonstrates that the defendant has been discriminating against females in the appointment of their administrative and supervisory employees". (A. 18).

It is a stipulated fact in this case[1] that the defendant's decisionmaker, Mike Whittaker, admitted that he preferred to have a man rather than a woman in the position of Assistant Principal at the Hartford School". Agreed Fact # 34. This is

[1]The Pretrial Order required the parties to exchange statements of fact which they proposed to prove at trial and to stipulate to as many of such facts as possible. (R. 1-127). As a result of this procedure, the parties filed a Statement of Agreed Facts which listed 219 separate facts which the "parties have jointly stipulated . . . are true and correct for purposes of this litigation and may be taken as established without need for further proof by any party". (R. 1-131). These stipulated facts are cited in the body of this Brief as "Agreed Facts #___.". References to the trial transcript are cited as "Tr. _____".

one of the three Assistant Principal vacancies sought by the plaintiff. The other two vacancies sought were at the Coffee Springs School and the Samson School. Agreed Facts ## 4, 11-35, 128-169b; Tr. 44-51, 24-26, 208-209.

Males were selected for all three of the Assistant Principal vacancies sought by the plaintiff. *Id.* It is a stipulated fact that the defendant's decisionmakers did not believe or contend that the males selected were better qualified than the plaintiff. Agreed Facts ## 134-139, 26-30, 164-170, 151-158. The defendant never articulated any reason for selecting the male candidates and rejecting the female candidates for the Coffee Springs and Samson vacancies. *Id.* The decisionmakers in the filling of such vacancies never testified, and no proof of their reasons for the selection of the male candidates was ever offered or received. Neither did the district court ever find what the reasons for the plaintiff's rejection for these vacancies might have been.

As to the Hartford vacancy, the district court found that the plaintiff "was discriminated against because of her sex when a male teacher was selected as Assistant Principal". (A. 13 & 10). The district court stated that "the reason for this determination was that, while both applicants were well qualified" for the job, the plaintiff was educationally better qualified than the successful applicant and that, while most of the employees of the Geneva County Board of Education are female, only one of the principals and Assistant Principals are women". (A. 13).

The defendant stipulated that the plaintiff was fully qualified for the Assistant Principal vacancy at Hartford. Agreed Facts ## 28, 30-32, 11-14, 134-139, 164-170; Pl. Ex. # 7 & # 13; Tr. 24-26, 44-45, 208-209, 178-179, 170-171. The defendant contended, however, that the male selected, Franklin Lee, was better qualified. The stipulated facts showed the following on this contention:

> 1. The plaintiff had the Master's Degree in Supervision and Administration required by the State of Alabama for all Assistant Principals, but Franklin Lee did not. Agreed Facts ## 79-84, 76, 14, 28; Tr. 26-33.

2. The plaintiff had the Certification in Administration and Supervision mandated by the State of Alabama and the accreditation standards of the Southern Association of Colleges and Schools, but Franklin Lee did not have such certification. Agreed Facts ## 79-84, 28, 76; Pl. Exh. ## 5, 4, 3, 6 & 18; Tr. 26-33, 95, 98, 207-208, 210-211. Code of Alabama, Section 16-23-1 (1975) (Requires that no person be hired without requisite certificate from State Superintendent of Education.).

3. The plaintiff had the required educational degrees and certifications in elementary education, including a Master's Degree in the latter field, but Franklin Lee had only a Bachelor's Degree in secondary education. (A. 6; Agreed Facts ## 14, 76, 79-84). The vacancies in question were in elementary schools and required elementary degrees and certifications. *Id.*

4. The plaintiff had six years prior experience as a teacher in the elementary grades, but Franklin Lee had *none* other than three months as a substitute. Agreed Facts ## 73-74, 11-14, 94, 76; Tr. 103-104, 197. The State of Alabama required that all Assistant Principals have at least three years prior teaching experience in the public schools. (Agreed Fact # 14; Tr. 213-214, 30, 103, 135; Pl. Ex. # 35, p. 28).

The defendant did not present any evidence of objective qualifications which made Franklin Lee more qualified than the plaintiff. The district court found that "the plaintiff was educationally better qualified than the successful applicant", Franklin Lee. (A. 13 & 6). The defendant premised its claim that Lee was better qualified on purely subjective factors of being a good "leader" and "disciplinarian". The district court found that the defendant had established "no . . . objective criteria to be utilized in selecting assistant principals among candidates". (A. 10). The district court also found that the defendant's decisionmaker, Mr. Whittaker, had testified, while describing his desire for a "strong disciplinarian", that they "wanted a man" for the Hartford vacancy because the majority of the faculty were women. (A. 8; Agreed Fact # 34).

The subjective qualities of being a "leader" and a "strong disciplinarian" were not at all clearcut in Lee's favor. The de-

fendant stipulated that it had no reason "to doubt that the plaintiff had sufficient leadership abilities to be an Assistant Principal for the defendant". (Agreed Facts ## 29, 29, 30; Tr. 194.). The plaintiff had exhibited leadership in her school, community and church - related activities. (Tr. 36-39; 191-192; Agreed Facts ## 187-193). The defendant stated that Lee had demonstrated leadership while he was a substitute teacher for three months, but the defendant stipulated that during this period he did not exercise any of the normal functions and duties of an Assistant Principal. (Agreed Facts ## 96-98; Tr. 84, 120).

The defendant also made reference to the plaintiff leaving her teaching job in January, 1982 because of her husband's transfer to Florida. The evidence was undisputed, however, that the plaintiff never sold her home in Hartford and that by April she had returned and applied for the upcoming vacancies in the various Assistant Principalships. (Tr. 45-50, 74, 77-79; Agreed Facts ## 22-25).

The district court found that the reasons articulated for the plaintiff's rejection as Assistant Principal were pretextual and unworthy of credence and, on this basis, entered judgment in her favor. (A. 10-13). After the district court learned that this finding required an award of back-pay and that, contrary to its original belief, back-pay had been proven at trial, the district court then reversed itself and held that the *same reasons* which it had earlier rejected as pretextual and unworthy of credence would have resulted in her non-selection even in the absence of the sex discrimination it found to exist. (A. 13-18).

REASONS FOR DENYING THE WRIT

The primary question presented here was not even decided in the court below. A finding of an abuse of discretion was all that was decided, and this was limited to the "unusual if not unique" circumstances of this case. This Court does not ordinarily review questions that are not decided below. The limited holding of an abuse of discretion does not conflict with

decisions in any other Circuit. Even if the question concerning the authority of a district court were decided below the decisions that the defendant relies upon from the Fourth Circuit do not stand for the proposition that a Court can reverse a judgment any time that it desires to do so without a motion from the party against whom the judgment was entered. Congress limited the court's *sua sponte* powers to the period ten days after entry of a judgment when it enacted F. R. Civ. P. 59 (d). After that 10 day period, the finality of a judgment can only be interrupted on a motion by the party against whom it is entered. Without such a motion, no manifest injustice can occur by preventing the district court from *sua sponte* reversing the judgment since the party against whom it was entered has not spoken against it. The defendant never challenged the original judgment under *Mt. Healthy* or any other basis. The district court correctly held that it was an abuse of discretion for the district court to raise the latter case *sua sponte* because it is only applicable to cases involving "mixed motives" and not to cases where the defendant's explanation of its motives have already been found to be pretextual and unworthy of credence.

I. The Questions Presented By The Petitioner Were Not Decided Below.

The first two questions presented for review by the defendant-petitioner concern the jurisdiction or authority of a district court to reverse a judgment seven months after it was entered when the party against whom it was entered never filed a motion or otherwise challenged the correctness of the judgment. These questions are not properly presented because the Court of Appeals did not decide the issue against the defendant-petitioner. (A. 23). The Court of Appeals plainly stated that "[b]ecause of the rarity of this situation we do not attempt to lay down a rule concerning the power of the court to act at all to alter or amend a judgment to the benefit of a non-moving party when the moving party has sought to alter or amend under F. R. Civ. P. 59 (e). Rather, assuming the

district court has such power, we conclude that in this case it abused its discretion". (A. 23).

It is well settled that "ordinarily this Court does not decide questions not raised or *resolved* in the lower court". *Youakim v. Miller,* 425 U.S. 231, 234 (1976). (emphasis supplied). See also, *Duigan v. United States,* 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from federal courts that questions not pressed or passed upon below are reviewed".). There can be no exceptional circumstances when the lower appellate court assumes *arguendo* that the question would be decided in the petitioner's favor, but then holds that the district court abused its discretion in exercising the authority it was assumed to possess. In that circumstance, the petitioner would still not gain the relief it seeks even if the question presented were resolved in its favor because the decision below did not turn on that question.

Thus, there is nothing to decide in the current case concerning the general power of the district court to do what it did, but instead there is only the very narrow issue of whether it abused its discretion in the "unusual if not unique" circumstances of this case. The petition does not assert that the determination of an abuse of discretion is worthy of a grant of *certiorari* and this issue is not among the four questions presented.

II. There Is No Conflict Among The Circuits.

The defendant's suggestion of a conflict between the current case and that of two cases in the Fourth Circuit is incorrect for two reasons. First, as already pointed out, the current case only involves an abuse of discretion in the "unusual if not unique" circumstances of this one case. (A. 22-23). A finding of an abuse of discretion in one case does not conflict with a general principle of law in another case when the latter principle is expressly assumed *arguendo* to be true. That is what happened herein. The Court of Appeals assumed, without deciding, that the district court has the discretion to do what it did, so long as it did not abuse that discretion. There is nothing in the two

Fourth Circuit cases cited by the petitioner which even remotely suggests a conflict among the Circuits on this point.

Secondly, even if the Court of Appeals had held that the district court did not have the discretion to *sua sponte* reverse a judgment when the party against whom it was entered did not challenge that judgment, that decision would not conflict with the two Fourth Circuit cases relied upon by the defendant-petitioner. In neither of the Fourth Circuit cases was this question presented or decided. In *United States v. Hollis,* 424 F.2d 188, 191 (4th Cir. 1970), the decision was limited to the context of granting relief *to the party filing a motion* for new trial on grounds not asserted in the motion. The decision did not decide that the court can grant relief from a judgment in favor of the party against whom the judgment is entered when such party has not filed a motion or otherwise challenged the judgment against it. Neither is the latter question presented or decided in *United States v. Jacobs,* 298 F.2d 469, 473 (4th Cir. 1961), where *both parties* "filed motions seeking modification of the judgment" and the Court simply ruled that the trial court was not restricted to the particular modifications suggested by the parties.

The two decisions are of no precedential value in deciding the much different issue of whether a trial court can reverse a judgment seven months after it was entered when the party against whom it was entered has not sought such a reversal. As the Court of Appeals correctly noted, the reversal of such a judgment when the only motion filed has been by the party obtaining the judgment "inhibits the error-correcting function of a Rule 59 (e) motion". (A. 23). Appeal would automatically result from every adverse ruling on remedies because "a successful plaintiff given a less-than-complete remedy could not ask for correction without putting at risk the judgment in her favor though the party cast in judgment has raised no question of the validity of the judgment". (A. 23). Thus, Rule 59 and Rule 60 would become dead letters for use by prevailing parties. Instead of presenting errors to the trial court through the latter rules and risking loss of the judgment itself the prevail-

ing party will be compelled to let the ten days under F. R. Civ. P. 59 expire so that the court's powers to reverse the judgment will expire with it. (A. 23).

Congress appeared to have similar concerns when it expressly restricted the Court's *sua sponte* powers to correct a judgment to the period ten days after the judgment was entered. See F. R. Civ. P. 59 (d). Under the latter rule the district court can only act on its own initiative within ten days after judgment.[2] After that, the Court's powers to correct error are limited to Rule 60 situations which require a motion from the party against whom the judgment was entered.[3]

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[2]See e.g., *Kain v. Winslow Mfg., Inc.*, 736 F.2d 606, 608 (10th Cir. 1984) ("Rule 59 (d) authorizes a district court to order a new trial on its own initiative for any reason for which it might have granted a new trial on motion of a party, but limits this authority by requiring such action to be taken within ten days after entry of judgment. Here the order of the district court granting Winslow a new trial was filed about thirteen months after entry of judgment. Hence, under Rule 59 (d), the district court's action was unauthorized".); *Tarlton v. Exxon*, 688 F.2d 973, 977-78 (5th Cir. 1982), *cert. denied sub. nom.*, 103 S.Ct. 3536 (1983) ("The time limit for filing a new trial motion imposed in Rule 59 (d) is mandatory and jurisdictional, it cannot be extended by the trial court. *** The language of Rule 59 (d) is explicit: the trial court may order a new trial for any reason it might have found sufficient on motion of a party, 'not later than 10 days after entry of judgment'. *** We conclude that absent a timely motion for a new trial, or an order by the trial judge within 10 days permitted by the Rule, the trial court was without jurisdiction to enter a *sua sponte order* for a new trial".); *Tsai v. Rosenthal*, 297 F.2d 614, 617 (8th Cir. 1961) ("Rule 59 (d) has been interpreted by the courts as conferring jurisdiction upon the trial court to act upon its own initiative only during the ten days immediately following the entry of judgment".); *Burnam v. Amoco Containers Co.*, 738 F.2d 1230 (11th Cir. 1984) ("As long as the court acts within ten days after the entry of judgment, the court has the power on its own motion to consider altering or amending a judgment".); *Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980); *Flores v. Procunier*, 745 F.2d 338, 359 (5th Cir. 1984); *Fuente v. Central Elec. Coop, Inc.*, 703 F.2d 63, 65 (3rd Cir. 1983); *Peterman v. Chicago, Rock Island and Pacific R. Co.*, 493 F.2d 88, 91 (8th Cir. 1974); *Demerety v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3rd Cir. 1962); *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); *Jackson v. Wilson Trucking*, 243 F.2d 212 (D.C. Cir. 1957).

[3]Rule 60, unlike Rule 59, does not have any provision for *sua sponte* altering a judgment except for "clerical mistakes" under Rule 60 (a). Substantive errors can only be corrected under Rule 60 (b) which re-

These restrictions on the court's *sua sponte* powers strike the proper balance between the compelling interests of the parties and society in the finality of judgments and the competing interest of avoiding erroneous judgments. After the ten day period under Rule 59 (d), the latter interests give way to the former unless the party against whom a judgment is entered files a motion under Rule 60 (b). The Court has no inherent or *sua sponte* powers after the 10 day period because it is assumed that no judgment could involve a manifest injustice sufficient to interrupt the finality of the judgment unless the party against whom the judgment is entered files a motion. In the absence of such a motion, the law assumes the correctness of a judgment that has been pending longer than 10 days and the interests in finality prohibit the trial court from *sua sponte* reversing such judgment.

In this context, the Eleventh Circuit correctly recognized that "strong policy considerations militate against what occurred here". (A. 23). In the words of the Court below, "the interest of the parties and society in the finality of judgments, and the legitimate expectation of the parties concerning the judgment to the extent it is not questioned by the parties, speak against pulling the rug from under the plaintiff eight months after she filed her motion to correct errors in the remedy granted her". (A. 24).

III. The Current Case Did Not Involve "Mixed Motives" Because The District Court Correctly Decided In The Original Findings That The Defendant's Articulated Reasons Were Pretextual And Unworthy Of Credence.

The defendant is incorrect in stating that the current case involved "mixed motives". The district court in the original

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quires a "motion" by the party seeking relief from the judgment. See e.g., *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976) ("In contrast, errors that affect substantial rights of the parties are outside the scope of Rule 60 (a). Such errors may be corrected under Rule 60 (b) if brought to the attention of the district court within the one year time limit".).

Opinion found that the reasons articulated by the defendant for selecting the male candidate were pretextual and unworthy of credence and, on this basis, entered judgment for the plaintiff.[4] (A. 1-11). The defendant never articulated any reasons for the plaintiff's rejection other than those which were held to be unworthy of credence in the original decision.[5] A case does not involve "mixed motives" if the reasons articulated by the defendant are rejected as pretextual and unworthy of credence. A "mixed motive" case is one in which the district court credits the defendant's articulated reasons, but also finds that sex or race discrimination played a role in the employment decision at issue. It is impossible to have a "mixed motive" case when, as here, the defendant's articulated motivation has been rejected as pretextual and unworthy of credence.

In structuring the question to be decided in the original decision, the district court specifically recognized that the plaintiff could only prevail if she established " 'that the stated reason for rejection was in fact a mere cover up for a discriminatory decision' ". (A. 2). This framework for deciding the ultimate issue was taken directly from *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 256, where this Court held that the plaintiff may prevail on the "ultimate" issue of intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence". The current plaintiff

[4]The district court's original decision relied upon the analytical framework of *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 257 (1981), insofar as it structured the question to be decided in the original findings as whether "the legitimate reasons offered were not the true reasons but a mere pretext'. (A. 2). The district court in its original findings held that in order to prevail the plaintiff must prove " 'that the stated reason for rejection was in fact a mere cover up for a discriminatory decision". (A. 2).

[5]A comparison of the district court's original Opinion and original Judgment shows that the latter dealt with the exact same articulated reasons for the plaintiff's treatment which had been held pretextual in the original decision. *Compare* A. 1-11 *with* A. 13-18.

was held to have satisfied this burden in the original decision of the district court. (A. 1-11).

After deciding that the defendant's articulated explanation of its motive was pretextual and not the true reason for its treatment of the plaintiff, the district court erred by *sua sponte* reasserting those *same discredited reasons* as the basis for a ruling that the same decision to reject the plaintiff would have been made in the absence of sex discrimination already found to exist. The latter question was decided conclusively when the defendant's articulated reasons were found unworthy of credence under the *McDonnell Douglas - Burdine* analytical framework. The court cannot credit motivations under the guise of *Mt. Healthy* which have been discredited as pretextual under the *McDonnell Douglas - Burdine* analysis. This would accomplish nothing in reaching the ultimate issue in the case, *viz.* whether sex discrimination caused the plaintiff's rejection. The *Mt. Healthy* inquiry, to the extent appropriate to a race or sex discrimination case,[6] is put to rest when the district court finds under *Burdine* that "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence". There is no comparable determination in a First Amendment case such as *Mt. Healthy* which precludes the possibility that the same decision would have been reached through a finding that the employer's reasons were pretextual and unworthy of credence.

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[6]One of the central concerns in *Mt. Healthy* was that an employer could use his First Amendment rights as a shield from a decision that would have been made for other reasons even in the absence of the exercise of such rights. 429 U.S. at 285-86. In a sex or race discrimination case, the chances of this type of defensive assertion of the protected characteristic is significantly lessened since race or sex are not mutuable characteristics which can be asserted at the whim of the employee in the same way as involved in First Amendment cases. More importantly, unlike the First Amendment plaintiff, the employee alleging race or sex discrimination must carry the burden of proving that the employer's articulated reasons were pretextual and unworthy of credence in order to establish such discrimination. As argued more fully above, this precludes the possibility that those discredited reasons could have caused the same decision to have been made even in the absence of the race and sex discrimination found to exist.

For these reasons, the district court abused its discretion in resurrecting the same reasons which it had already rejected as the basis for applying *Mt. Healthy*. Concerns about the application of *Mt. Healthy* were not the true reasons for the district court's *sua sponte* reversal of the original judgment for the plaintiff. The true reason for this unusual event was stated by the district court in the hearing of August, 1984. When the district court realized that it had overlooked the proof of back-pay at the original trial and that it would be necessary to award back-pay unless the findings of liability were overturned, the district court stated that it never would have ruled in the plaintiff's favor if it had known the amount of back-pay involved. (Tr. 238-239). It was in this context that the district court attempted to backtrack and to assert *Mt. Healthy* as an "overlooked" prong of the analysis necessary to decide the plaintiff's case. In fact, however, *Mt. Healthy* was not overlooked in the original decision, but was expressly cited at page two of such decision as authority for the necessity of deciding whether the plaintiff would have been rejected even in the absence of the sex discrimination found to exist. (A. 2). Obviously, the district court was incorrect in asserting that it had overlooked the *Mt. Healthy* inquiry in the original decision. Because a court cannot refuse to find liability merely because it disagrees with the amount of back-pay such a ruling would entail, an abuse of discretion was not hard to find and is fully supported by the record.

IV. The Clearly Erroneous Rule Did Not Apply To The Question Decided By The Court Of Appeals.

The defendant accuse the appellate court judges of "arrogance" in refusing to apply the "clearly erroneous" standard of Rule 52 (a) in its decision. The defendants fail to explain how the latter standard could be applicable to a determination that the district court abused its discretion. The very case it cites as evidence of "arrogance" holds that Rule 52 (a) does not apply to questions of law or to anything other than the trial court's factual findings. *Pullman Standard v. Swint,* 456

U.S. 273, 291-293 (1982). Rule 52 (a) says the same thing on its face. The district court did not reverse the trial court's findings of fact, but simply held that the trial court had abused its discretion in altering these findings *sua sponte* over seven months after they were entered. (A. 23-24). In this context, Rule 52 (a) did not apply and the only arrogance in the record is that of the defendant accuser in making such an unfounded charge.

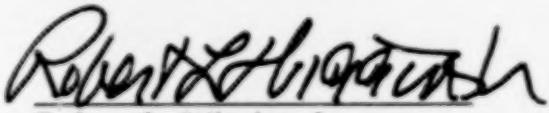
V. The Defendant Feigns Surprise That Back-Pay Was Claimed.

The defendant-petitioner argues that it did not know back-pay was claimed and this justified the district court's belated raising of *Mt. Healthy* on its own initiative. Pet., pp. 27-28. The defendant-petitioner fails to tell the Court that back-pay was explicitly claimed in the Complaint, was proven at trial and was reproven at the post-trial hearing in August, 1984. *At no point* in the trial court or the appellate court did the defendant ever claim that it was unaware of the claim of back-pay. That claim has been mentioned for the first time in this Court and is simply untrue.

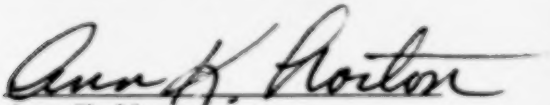
CONCLUSION

The current case is not one for which *certiorari* should be granted. The defendant has presented questions which were not decided by the Court of Appeals concerning the authority or the jurisdiction of the district courts to *sua sponte* reverse its own judgment outside the time limits provided by Congress for such action. The other questions presented were also not decided by the Court of Appeals except as a part of a determination that the district court abused its discretion in the "unusual if not unique circumstances" of this one case. The decision of the Court of Appeals on all of the points decided was unexceptional and did not conflict with the law of any other Circuit. For all of the reasons recited in this Brief, the Petition should be denied.

Respectfully submitted,



Robert L. Wiggins, Jr.



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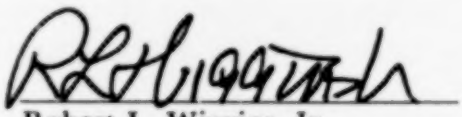
CERTIFICATE OF SERVICE

This is to certify that two copies of the above and foregoing have been served by United States mail, postage prepaid and properly addressed on Mr. Donald B. Sweeney, Jr., Attorney at Law, 1700 Financial Center, Birmingham, Alabama 35203 and Mr. Joseph P. Hughes, Attorney at Law, P. O. Box 10, Geneva, Alabama 36340.



Robert L. Wiggins, Jr.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-T-489-S
GENEVA COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This cause is before the court on two matters: (1) the defendant's October 20, 1986, motion for a stay pending appeal; and (2) determination of an appropriate backpay award. A hearing was held to consider these issues on October 21, 1986. For reasons that follow, the stay is due to be denied in part and granted in part, and backpay is to be calculated in accordance with general principles by determining the amount of potential earnings less interim earnings.

I.

On September 22, 1986, this court issued an order and injunction enforcing the mandate of the Eleventh Circuit that plaintiff Maryann Hidle be afforded relief from the sex-based discrimination inflicted upon her by defendant Geneva County Board of Education. The appellate court specified that such relief must include Hidle's immediate placement in the positions of assistant principal and teacher. This court ordered the injunctive relief specified, and continued the case for determination of further relief. The parties agree that backpay is due Hidle, and now ask the court to consider the appropriate amount due.

The contention between the parties regarding backpay concerns whether interim earnings of Hidle should be subtracted from the amount she potentially would have earned in salary, had the school board not discriminated against her. Under Title VII of the Civil Rights Act of 1964, relief should be designed to "make whole" the victim of employment discrimination by placing her in just that position she would have been in if she had not suffered discrimination. However, as in the case of a contractual breach, this requires the victim to mitigate financial harms by exercising reasonable diligence in finding alternative employment. 42 U.S.C.A. § 2000e-5 (g). Any earnings from such employment are then subtracted from potential earnings at the desired job in determining backpay. *Id.*

The school board does not allege that Hidle failed to use reasonable diligence to mitigate her loss of earnings. They merely argue that the amount of her interim earnings must be considered now in assessing her entitlement to backpay. Hidle argues that in this instance interim earnings should not be considered because the school board failed to assert timely that her backpay award would be diminished by the amount of those earnings.

While the court acknowledges that Hidle is correct in her claim that the burden is upon the school board to establish any offsets to backpay, at this point the court's primary concern is to see the just and expeditious resolution of this case. The law is quite clear in regard to the proper procedure for calculation of backpay awards. Reasonable diligence in mitigation is required and there is no question that Hidle has met this standard. There is no reason for the introduction of further irregularities into this already unusual case. In the court's view the fairest resolution for both parties is to award backpay less interim earnings.

Hidle offers the figures contained in plaintiff's exhibit #1, filed October 7, 1986, for determination of her potential earnings. Although the school board now offers an altered set of figures on potential earnings, the court notes that Hidle's figures are based upon calculations of the defendant. As both

parties previously agreed to the accuracy of Hidle's figures, the court will adopt them for calculation of potential earnings. The amount of interim earnings for the years 1982 through 1986 are set forth in plaintiff's exhibit #1, filed October 21, 1986. Based upon these figures and calculations, Hidle is entitled to receive a backpay award calculated in the manner set forth in the October 21 exhibit, but substituting the base backpay figure of $87,956 contained in the October 7 exhibit, for that of $85,812.

II.

The school board asks the court to stay its order of injunctive relief, entered September 22, 1986, and already effectuated, as well as the above-determined award of backpay. The court is of the opinion, and, indeed Hidle agrees that the backpay award should be stayed. However, the injunctive relief ordered and implemented will not be stayed. Two factors require that the injunction remain in effect.

First, the law of the Eleventh Circuit provides that once a determination has been made that discrimination has occurred, the infliction of irreparable harm is presumed. *Middle-Keirn v. Stone,* 655 F.2d 609, 612 (5th Cir. September 8, 1981) (Unit B). Therefore any delay or gap in provision of injunctive relief from discrimination would cause harms that could not be remedied through provision of relief at some later date. In the court's view, this is particularly true in the context of a school setting, where it seems likely that an administrator's authority could be impaired by introduction into his or her administrative position late in the school year. Moreover, in this particular case, Hidle's authority as assistant principal would undoubtedly be undermined if the status quo is disturbed by her abrupt removal from the position she has so recently assumed. Should she later be reinstalled in that position upon denial of the school board's petition for writ of certiorari, it would clearly be difficult for her to reestablish the authority and respect due her position.

Second, it is not within this court's power to stay the injunctive relief provided Hidle. It was the mandate of the Eleventh Circuit Court of Appeals that required the school board to place Hidle in the assistant principalship and teaching position she now holds. That mandate has not been lifted. The school board cites two rules delineating a court's authority to stay an injunction pending appeal. Fed.R.App.Proc. 41 (b) and Fed. R.Civ.Proc. 62 (g). But both of these provisions are directed at appellate courts. Where, as here, the district court acted only to implement the mandate of the appellate court, the authority of the above rules cannot be invoked to alter the decision of the appellate court in any way.

In accordance with the reasons given above, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That plaintiff Maryann H. Hidle have and recover from defendant Geneva County Board of Education backpay calculated as set forth in this order;* and

(2) That defendant Geneva County Board of Education's October 20, 1986, motion for a stay pending appeal is granted as to backpay and is denied in all other respects.

DONE, this the 23rd day of October, 1986.

/s/ MYRON H. THOMPSON
United States District Judge

*So as to make the record complete, the court asks that within seven (7) days from the date of this order the parties are to file a joint statement reflecting Hidle's backpay as set forth in the memorandum opinion.

Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-968 (3)

IN THE

Supreme Court Of The United States

October Term, 1986

GENEVA COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARYANN H. HIDLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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16 pp

ARGUMENT ADDRESSED TO ISSUES RAISED BY RESPONDENT

(1) The Eleventh Circuit has devised a means of evading Rule 52(a) Fed. R. Civ. P. by purporting to decide a case on grounds of "policy".

(2) The Eleventh Circuit's decision conflicts with logic, with Rule 59(e) Fed. R. Civ. P. and with decisions of the Fourth Circuit.

(3) The Eleventh Circuit's decision conflicts with Title VII of the Civil Rights Act.

(4) The Eleventh Circuit's decision conflicts with decisions of the United States Supreme Court and prior decisions of the Eleventh Circuit.

(5) The Eleventh Circuit's reversal and award of back pay is unsupported by the record and unsubstantiated by the District Judge's findings.

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REPLY BRIEF OF PETITIONER

ARGUMENT ADDRESSED TO ISSUES RAISED BY RESPONDENT

Petitioner respectfully submits this reply brief to clarify factual and legal contentions which arise from Respondent's brief in opposition to Petitioner's request for a writ of certiorari. In reply, Respondent attempts to slough over and minimize issues in order to divert the Court's attention from the Eleventh Circuit's flagrant deviation from established legal principles. The following summary highlights the importance of the issues which are at the heart of Petitioner's request for review.

(1) The Eleventh Circuit Has Devised A Means Of Evading Rule 52(a) Fed. R. Civ. P. By Purporting To Decide A Case On Grounds Of "Policy".

The Eleventh Circuit has circumvented the clearly erroneous standard mandated by Rule 52(a) Fed. R. Civ. P. by purporting to reverse this case on grounds of "policy", and by confining its holding to the unique result of this case. If appellate courts were given the license to look to the result of a case, and reverse because of what they perceived to be unfairness to a particular party, appellate review would be unpredictable and anarchic. It is respectfully submitted that Rule 52(a) circumscribes appellate power by stipulating that findings of fact are to be reversed only if clearly erroneous. If, however, "findings are infirm because of an erroneous view of the law", the Court of Appeals must remand the case for the application of the correct legal principle. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-293 (1983).

These rules place certain duties on a Court of Appeals: (1) to review the facts (2) to establish the applicable law. If the Court of Appeals had reviewed the facts, or had pronounced the controlling legal principle it would have found itself subject to the strictures of Fed. R. Civ. P. 52(a). Since it could not find that the facts were clearly erroneous, the Eleventh Circuit expressly declined to pronounce on the facts in its opinion. (App. A-21)[1] Nor could the Court of Appeals find that Rule 59(e) had been misapplied. Therefore the Court avoided its duty to rule that the District Court had the power to correct its erroneous judgment as it did under Fed. R. Civ. P. 59(e). Instead "assuming the District Court has such power", the appellate court concluded that in this particular case it abused its discretion. (App. A-23).

Respondent argues, but cites no authority for the proposition that Rule 52(a) does not apply to a determination that the

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[1]References to Respondent's Brief are denoted as "H-___"; to Petitioner's Brief as "A-___"; to the transcript as "Tr. ___", and to the Record as "R-___".

District Court abused its discretion. (H-15) If appellate courts could reverse on the basis of "abuse of discretion" without reviewing the facts or the underlying law, the effect of Rule 52(a) could be nugatory. While Petitioner concedes the important policy considerations underlying the necessity for finality of judgments, such policy does not apply to a case such as this, where Hidle herself had opened up the judgment by her motion and interrupted its finality.

Petitioner earnestly requests that the Supreme Court grant certiorari to halt the Eleventh Circuit's use of its new-found device to enable it to overstep its role by reversing factual determinations of the District Court on grounds of "policy".

(2) The Eleventh Circuit's Decision Conflicts With Logic, With Rule 59(e) Fed. R. Civ. P. And With Decisions Of The Fourth Circuit.

A careful reading of the Eleventh Circuit's opinion in this case reveals that although the Court of Appeals stated that it would not rule on the power of the District Court to correct errors in a judgment following a Rule 59(e) post-judgment motion, in fact the Eleventh Circuit's decision was based entirely on this rule. The appellate court's expressed concern was that when Hidle asked the Court to amend the judgment, "she lost her judgment to the defendant who had not asked any post-judgment relief." The Court reasoned that the error correcting function of a Rule 59(e) motion would be inhibited if a successful party could not ask for correction without putting its judgment at risk, and if a defendant "successful on five claims cannot safely seek for correction concerning claim six." (App. A-23).

It is obvious that the Eleventh Circuit's holding was that a District Court may not alter or amend a judgment pursuant to Rule 59(e) to benefit a non-moving party and to the detriment of the moving party. In effect then, the Eleventh Circuit's rule is that if the movant is the successful party, the judgment may not be amended to the detriment of that successful party. Yet

the success of Hidle, the movant, was predicated on a mistake of law. Is the Court then restricted to address only Hidle's remedies (although flowing from a legally erroneous decision) and leave the substantive legal error uncorrected?

This holding is illogical and directly conflicts with the two Fourth Circuit cases cited by the Board: *United States v. Hollis,* 424 F.2d 188 (4th Cir. 1970) and *United States v. Jacobs,* 298 F.2d 469 (4th Cir. 1961).

In *Hollis, supra,* a ship repairer's employee brought suit against the United States for injuries sustained in a naval vessel, and the United States sought indemnity from the ship repairer. In his first order the District Judge found that the Navy was negligent and awarded damages against the United States, but found no negligence on the part of the plaintiff or the ship repairer. The plaintiff submitted a post-trial motion seeking an amendment of the order with respect to damages, or a new trial on the issue. The Court then amended its order with regard to damages but *also found the plaintiff guilty of contributory negligence.*

Clearly, this case is on all fours with the case at bar. As in Hidle's case, it was the plaintiff who filed the motion seeking an amendment with respect to damages and in both cases the District Judge amended his findings with respect to liability *to the detriment of the successful moving party.*

In *Jacobs, supra,* the District Court's order had required one of the parties to deposit a check with the clerk of the court which was to be paid to the opposing party on the performance of certain duties by that opposing party. Both parties filed post-judgment motions seeking modifications of the order. Subsequently an intervenor was allowed into the suit and it filed a motion seeking payment out of the funds held by the court. The court then amended its original order, *inter alia* granting judgment to the intervenor. Although the court's modification favored the intervenor, and was detrimental to the original parties, the Fourth Circuit held that once the matter had been opened up by motions, the court had the power to enter such order as was required in the interest of justice.

Both Hidle and the Eleventh Circuit confuse the operation of Rule 59(e) with the power of a district court to act *sua sponte* to amend a judgment within 10 days after the judgment was entered if neither party files a motion. Rule 59(d) Fed. R. Civ. P. Obviously, Rule 59(d) is inappropriate when a motion has been filed. In the case at bar, judgment was entered on July 2, 1984, a motion timely filed on July 11, 1984 and the motions were heard on August 28, 1984. It would be entirely illogical if the Court's ability to amend the judgment to the detriment of Hidle had expired on July 12, 1984, *prior to the hearing,* while the Court retained jurisdiction to amend the judgment in any other respect until it ruled after the hearing. Obviously, Rule 59(d) applies to cases in which no motion has been filed and the Court acts *sua sponte,* while Rule 59(e) empowers a court to retain jurisdiction to correct all errors after a motion has been filed and the case has been opened for consideration.

(3) The Eleventh Circuit's Decision Conflicts With Title VII Of The Civil Rights Act.

The Eleventh Circuit has contravened the clear wording of a federal statute by ordering reinstatement, damages and injunctive relief without inquiring whether Hidle was refused employment for any reason other than sex discrimination. The statute states:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.* (Emphasis added).

42 U.S.C. § 2000e-5(g).

(4) The Eleventh Circuit's Decision Conflicts With Decisions Of The United States Supreme Court And Prior Decisions Of The Eleventh Circuit.

By determining liability and awarding damages to Hidle without inquiring whether the Board would have made the same employment decision absent the discriminatory conduct, the Eleventh Circuit has ignored this Court's holding in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274 (1977), and prior decisions of the Eleventh Circuit.

In the Eleventh Circuit, the *Mt. Healthy* inquiry presents a complete defense in a Title VII case. For instance, the Eleventh Circuit has ruled that "[W]hen a significant unconstitutional motive is ultimately proved, by either circumstantial or direct evidence, the defendants' only form of rebuttal is under *Mt. Healthy.*" *Lee v. Russell County Bd. of Educ.,* 684 F.2d 769, 774 (11th Cir. 1982). Furthermore, once discrimination has been proven in a Title VII case, whether by circumstantial or direct evidence, a presumption of entitlement to appropriate remedies arises which can be rebutted by applying the *Mt. Healthy* test. In *Lewis v. Smith,* 731 F.2d 1535, 1538 (11th Cir. 1984), the Court explained that once discrimination is proven, "[T]he burden then shifts to the employer to rebut the presumption by showing that the discriminatee would not have been hired absent the discrimination."

Respondent argues that the current case does not involve "mixed motives". Respondent states that a mixed motive case "is one in which the district court credits the defendant's articulated reasons, but also finds that sex or race discrimination played a role in the employment decision at issue. It is impossible to have a 'mixed motive' case when, as here, the defendant's articulated motivation has been rejected as pretextual and unworthy of credence." (H-13).

Respondent is incorrect. At no stage in the proceedings did any court reject the Board's reasons as pretextual or unworthy of credence. On the contrary, the District Courts' opinions reveal the many credible reasons which the Board presented to

the Court, and which the Court found had justified the Board's selection of Lee: that Hidle had resigned her job to move to Florida in a move she described as essential for her family life (App. A-3, 5); Hidle's lack of experience in administration and supervision (App. A-6) and reservations about Hidle's ability to lead (App. A-7). In contrast, the Court found that Lee had considerable teaching experience in the Army (App. A-4); he was immediately available (App. A-4); he had outstanding recommendations and had demonstrated excellent leadership performance on the job (App. A-8); he was punctual and dependable (App. A-8). If as Respondent alleges, the Court had discredited the Board's reasons, the Court would not have found this case to be a "close case" and would not have concluded that Hidle's case was "not at all overwhelming" (App. A-10). The many credible reasons presented by the Board and accepted by the District Court indicate that this case is, like *Mt. Healthy,* one in which an employer acts pursuant to "mixed motives".

There is no basis for Respondent's theory that the District Judge applied the *Mt. Healthy* test as a subterfuge to justify his denial of an award to Hidle (H-15). Such an accusation flies in the face of the record and credibility of a Federal Judge. First, as has been pointed out above, in the Eleventh Circuit a finding of discrimination raises only a presumption of entitlement to remedies. *Lewis v. Smith, supra.* The District Judge was not compelled to resort to a subterfuge to alter his findings on liability because no damage had been proven: he could have found liability but that the evidence rebutted the inference to remedies.

(5) The Eleventh Circuit's Reversal And Award Of Back Pay Is Unsupported By The Record And Unsubstantiated By The District Judge's Findings.

This case has the unusual feature in that the Eleventh Circuit has awarded back-pay which is neither supported by the record nor the trial judge's findings but based on a *post-judgment motion.* (App. A-24)

The pretrial order had required Hidle to file a statement of agreed and disputed facts in support of "her claim as to liability and damages". (R. 127) No less than 202 assertions of fact were proposed by Hidle and agreed to by the Board. (R. 131-154) Not one of Hidle's proposed facts related to back-pay, salary or monetary damages, although the agreed facts would have been an ideal vehicle for establishing such entitlement. Nonetheless, in rendering his original opinion, the District Judge addressed the question of damages and found that Hidle had failed to establish financial loss. The District Judge addressed the damages issue on two subsequent occasions: at the post-trial hearing and after the appeal. On each occasion he found no basis for an award of back-pay, finding it anomalous that a tenured teacher, who *voluntarily* broke her contract at mid-term, gave up a tenured position and moved to Florida, should be entitled to claim damages from the school system which she had abandoned during the school year.

Finally, the Board wishes to correct certain facts which Hidle has presented to the Court in an effort to distort the record:

(a) Respondent says that it was a stipulated fact in the case that "the defendant's decision-maker, Mike Whittaker, admitted that he preferred to have a man rather than a woman in the position of Assistant Principal at the Hartford School. Agreed Fact #34" (H-4). This statement constitutes a distortion of the record and is misleading in two respects. First, the District Judge found that Whittaker made the recommendation but it was the Superintendent and the Board who employed Lee and thus were the decisionmakers. (App. A-4). Second, it is important for the Court to be aware that Whittaker's statement was qualified by the following additional sentence: "Mike Whittaker preferred Lee, who was a man, as opposed to Hidle who was a woman." (R. 136) Moreover, in commenting on this statement the trial judge found that it was weakened by Whittaker's later explanation that he needed a disciplinarian such as he knew Lee to be. (App. A-8)

(b) This case centers on a vacancy which occurred at the Hartford School. Respondent's reference to events which oc-

curred at the Samson School are misleading since the trial judge ruled that evidence concerning Samson School was inadmissible because the Samson vacancy had occurred subsequent to that at Hartford School. (Tr. 16) Respondent's references to the vacancy at Coffee Springs School are also due to be discounted because the trial judge did not find any discriminatory practice by that school against Hidle.

(c) Respondent endeavors to establish that Hidle was better qualified for the job of Assistant Principal than Lee. However, the Court found that the requirement of a Master's Degree in Administration and Supervision would only be enforced if the school did not comply within one year of a warning. Lee was already working on that degree at the time of his selection and obtained it nine months after his selection. (App. A-5, 6) The dilemma facing every employer is to assess the academic qualifications, recommendations, past experience, character and personality of the applicants for a job, and to try to project those criteria into the position which is to be filled. In this case the Board had first-hand knowledge that Lee would do an excellent job since he had already proven himself. He had established his authority over the students and teachers and was functioning *de facto* as an Assistant Principal. It would hardly have been reasonable for the Board to displace a proven administrator and train a new Assistant Principal whose performance in that position may or may not have been adequate.

CONCLUSION

The Eleventh Circuit's decision conflicts with established and important legal principles. Petitioner respectfully submits that the issues raised by this petition merit review and that a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Reply Brief of Petitioner on each counsel for Respondent, namely: Robert L. Wiggins, Jr., Esq., 15th Floor, Colonial Bank Building, Birmingham, Alabama, 35203; and Coleman Hamm, Esq., 9636 Parkway East, Birmingham, Alabama, 35215, by deposit in United States Mail box, first class, postage prepaid and correctly addressed, this the 10th day of February, 1987. All parties required to be served have been served.

Donald B. Sweeney, Jr.